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THE SUPREME COURT AND LITIGATION ACCESS FEES: THE RIGHT TO PROTECT ONE'S RIGHTS*—PART I

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OUTLINE

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PRELUDE

My topic is framed by a trio of United States Supreme Court decisions: *Boddie v. Connecticut*,[1] *United States v. Kras*,[2] and *Ortwein v. Schwab*.[3]

To set the stage, I offer the following phantasmagoria:

Imagine that the Supreme Court grants petitions for certiorari on the same day in two cases from the same state. Each case involves a finance company's effort to repossess from the petitioner an automobile which the company says, and the petitioner denies, secures a valid defaulted debt owed to the company by the petitioner.

In case *A*, the company's agent has himself taken away the car. The petitioner, having been warned that it might be a criminal act for him to try to recapture the car on his own, has sought to file a civil action for conversion (in which the standard relief would be a money judgment for the car's value). He has been turned away because of failure to pay a twenty-dollar filing fee which (according to his uncontradicted affidavit) he had no means of paying. He now petitions from the state supreme court's judgment upholding, against due process attack, the exclusionary application of the filing fee.

In case *B*, the car was repossessed by a deputy sheriff, acting at the company's request under a prejudgment replevin writ. The writ was granted at a judicial hearing of which petitioner was notified but from which he was excluded because of his inability to pay a ten-dollar "appearance fee."[4] Thereafter, the petitioner tried to file a civil action in the state courts, complaining of an unconstitutional deprivation of property without due process of law[5] under *Fuentes v. Shevin*.[6] The remedies sought were a decree ordering return of the car pending

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1. 401 U.S. 371 (1971).

HEREINAFTER THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

R. POSNER, ECONOMIC ANALYSIS OF LAW (1972) [hereinafter cited as POSNER];

Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) [hereinafter cited as Michelman].

2. 409 U.S. 434 (1973).

3. 410 U.S. 656 (1973).

4. Appearance fees are not imaginary. *See* Silverstein, *Waiver of Court Costs and Appointment of Counsel for Persons in Civil Cases*, 2 VALPARAISO L. REV. 21, 41 (1967).

5. *Cf.* Bacon v. Graham, 348 F. Supp. 996 (D. Ariz. 1972) (holding unconstitutional requirement that respondent tender witness fees as condition of subpoenaing witness in pretermination welfare "fair hearing" required by Goldberg v. Kelly, 397 U.S. 254 (1970)).

6. 407 U.S. 67 (1972).

a proper hearing and compensation for the elapsed period of deprivation. This action was repulsed because of the petitioner's inability to pay the twenty-dollar court filing fee, and he now seeks review of the judgment upholding the exclusionary imposition of the latter fee.

Provoked and inspired by *Boddie, Kras,* and *Ortwein,* we might imagine the Court deciding in favor of petitioner *B* but against petitioner *A*, offering the following reasons for the apparent disparity of treatment:

1. We first compare the state's refusal to lend an ear to *A*'s conversion action with its refusal to allow *B*'s appearance at the replevin hearing. We conclude that *B*'s due process rights were violated, but not *A*'s. The principal ground for these differing conclusions is that *B* was made a defendant, whereas *A* sought to be a plaintiff. This difference is determinative for the following reasons:
   (a) As a defendant, *B* had no possible way of protecting his interest in his car except to appear and defend in the replevin action. (We note that *B* has a constitutionally cognizable interest in avoiding even temporary dispossession of his car pending final judgment on the merits in the replevin action.[7]) *A*, by way of contrast, possibly could have terminated—or even entirely avoided—loss of possession of his car, and could have secured at least partial recompense for any temporary deprivation, by remonstrating with the company's agent or, perhaps, by offering to pay ("settle") for the car's return.[8]
   (b) When *B* was forced to default by the "appearance fee," there issued a judicial writ which, if valid, would have barred him forever after from legal recourse to vindicate his claimed right to the car during the period of the deputy's impoundment.[9] *A*, on the other hand, has suffered a merely temporary frustration. As soon as he raises enough money to pay the filing fee, he can have his

7. *See* Fuentes v. Shevin, 407 U.S. 67 (1972). The Court in *Fuentes* evidently meant that a person has a protected claim to actual possession of his asset through any given period of time and not just a claim to the monetary equivalent value of such possession, for the Pennsylvania statute invalidated in *Fuentes* assured compensation for any temporary dispossession found unjustified after full trial on the merits. *See id.* at 75 n.7, 81-82, 85-86; POSNER 275-76.

8. This "difference" in the situations of defendants and plaintiffs is discussed at text accompanying notes 100-05 *infra.*

9. This conclusion assumes that the prejudgment replevin writ would be given res judicata effect as to the right of possession during the period between initial seizure and adjudication on the merits. Such was apparently not the fact in *Fuentes.* See note 7 *supra.*

claims tested in court; and, if he prevails, he can secure both retrospective and prospective relief.[10]

(c) The state excluded *B* from the litigation forum just when there impended an act (the deputy's repossession) which would be a direct and immediate violation of *B*'s property rights if *B*'s claim were sound. But *A*, even assuming his claim to be sound, has merely been excluded from seeking compensation for a violation of his rights already committed by the time the fee controversy arose. Preventing violations is more important than compensating for violations already committed.[11]

(d) In *B*'s case, the state was threatening to commit an active violation of *B*'s rights; however, in *A*'s case, the state's role was the merely passive one of not assisting *A* in gaining requital for the company's supposed violation of his rights. The due process guaranty is concerned with *state* behavior, and active violation by the state is considered worse than a mere passive failure to give protection against violations by others.[12]

(e) Moreover, we cannot infer from the mere fact that state law recognizes a civil cause of action, such as that for conversion, that a corresponding personal *right* is thereby accorded to the victim-plaintiff. For all we can tell, the state, by creating the cause of action, intends merely to enlist the victim's aid in a general program for deterring behavior which is socially undesirable. If so, why may not the state use filing fees as a device for screening out cases of marginal significance? On the other hand, it is unambiguously clear (despite the state's willingness to exclude *B* by insisting on the "appearance fee") that the interests which defendants have at stake in lawsuits are true personal rights for which their holders may demand respect and protection.[13]

2. We are now in a position to compare the imposition of a filing fee

10. "Prospective relief" would consist of a money judgment for the value of the car. "Retrospective relief" would consist of interest on that amount from the date of the tortious taking. The "finality" notion is discussed at text accompanying notes 106-14 *infra*.

11. For possible distinctions between preventive and compensatory relief and between primary and secondary (remedial) rights, see text accompanying notes 128-38 *infra*.

12. For discussion of the question of an active state role vis-à-vis a passive one, see text accompanying notes 139-50 *infra*.

13. For an exploration of the notion of rightless litigants, see text accompauying notes 116-20 *infra*.

in *B*'s civil action with the similar imposition in *A*'s civil action. We recognize that *B* has now become a plaintiff, so that in certain respects his situation resembles *A*'s, *viz.*: (a) *B* could possibly get his car back, and even secure compensation for the period of deprivation, by remonstrating with the deputy (or, perhaps, the governor or legislature of the state) and with the company. (b) Even if that does not work, *B* has suffered a merely temporary hindrance to his lawsuit. As soon as he can raise twenty dollars for the filing fee he can proceed. (c) In part, *B* is seeking merely compensatory relief. But *B*'s case differs from *A*'s in the following crucial respects:

(a) Insofar as *B* is seeking preventive relief, his quest is more important than *A*'s prayer for monetary compensation.

(b) Even more significantly, *B* sues to vindicate a "constitutional right" or "fundamental interest" (*i.e.*, not to have the state take away his car without first affording him due process of law), whereas *A* complains merely of violation of his common-law right not to have his possessions involuntarily molested. Having your constitutional rights violated must be deemed worse than having your common-law rights violated; or, at any rate, violations of constitutional rights must be deemed to give you a more compelling claim to court access.[14]

(c) While it is true that *B* could possibly gain satisfaction of his interests through extrajudicial negotiations with the state government, the need for court access is more urgent where the only alternative is inducing *the government* to grant an acceptable settlement than where it is merely a private adversary who must be convinced.[15]

Now I should be the last to deny the somewhat stupefying character of my little fantasy. Taken as a whole, the points offered may stir in some readers an acute sense of ire and bafflement. I think one

14. For an examination of this proposition, see text accompanying notes 159-86 *infra*.

15. It is unclear whether the "monopolization" of relief deemed important in *Boddie* and *Kras* was monopolization by the judiciary or monopolization by the government as a whole (where the only alternative to judicial relief is a governmental concession). *See The Supreme Court, 1970 Term*, 85 HARV. L. REV. 40, 107 n.18 (1971). *See also* LaFrance, *Constitutional Law Reform For the Poor: Boddie v. Connecticut*, 1971 DUKE L.J. 487, 534-36; Note, *Indigent Access to Civil Courts: The Tiger Is at the Gates*, 26 VAND. L. REV. 25, 46-47 (1973). That the *Ortwein* opinion does not cite appellants' opportunity to negotiate with the welfare officials as an alternative avenue to relief (see text accompanying note 33 *infra*) may perhaps be taken as suggesting the latter interpretation.

can be precise about at least some of the causes. In the first place, some of the distinctions drawn appear to contradict those taken at other points in the same story.[16] But more fundamentally, premises are stated or implied which simply do not square with ordinary and traditional perceptions and feelings about the purpose and meaning of legal rights and lawsuits, or which take a hard position on some deep, earnestly disputed, and perhaps irresolvable sociological or jurisprudential issue.[17]

I cannot pretend to know with certainty whether the Supreme Court would actually endorse all the points advanced in my story. I do know (at least my reason tells me) that the Court subscribes to some of these points, because belief in *some* subset of the whole collection is logically implied by the Court's holdings and seriously intended *dicta* in the three decisions we are to examine.

A. The Access Fee Decisions and What Is Wrong with Them

In the *Boddie* case, the Court, speaking through Justice Harlan, held that Connecticut denied due process of law to persons wishing in good faith to sue for divorce but unable to pay the approximately sixty dollars in filing fees and process-serving fees demanded by the state as a condition of allowing the suit. For my purposes here, I shall presume to rearrange slightly the order of reasons given for this conclusion:

(1) "Prior cases establish . . . that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[18]

(2) Claims based on this principle have typically been pressed by defendants. The reason is that defendants always can, while plaintiffs usually cannot, claim to be in the position of having been "forced to settle their claims" in court. But in this respect a potential divorce plaintiff is like a defendant, because without a judicial proceeding a divorce is, literally and absolutely, unobtainable.

(3) The relief, a change in marital status, which petitioners are "forced" to seek through the judicial process (in the sense that it is not obtainable in any other way), "involves interests of basic impor-

16. Compare the treatments of temporary deprivation in points 1(a) and 1(b). Consider also the internal contradiction in point 1(e).

17. See points 1(c), 1(d), 1(e), 2(b).

18. 401 U.S. at 377.

tance in our society,"[19] as is indicated by prior decisions recognizing constitutional protection for interests in free choice of marital partners,[20] procreation,[21] and the raising of children.[22]

(4) "Our cases further established that a statute or rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity . . . is beyond question."[23] In particular, "a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard."[24] The fee requirements had such an effect here.

(5) None of the justifications advanced by the state for application of its fee requirement to indigent, would-be divorce suitors is sufficient to override the due process rights of those suitors. (The unsuccessfully claimed justifications included "the prevention of frivolous litigation . . . [and the] use of court fees and process costs to allocate scarce resources.")[25]

The *Kras* case involved an indigent petitioner seeking a bankruptcy discharge. According to his uncontested affidavit, the petitioner's financial situation was such that he was "wholly unable to pay or promise to pay the [fifty-dollar] filing fees, even in small installments [as permitted by the statute] . . . and also provide [himself] and [his] dependents with day-to-day necessities."[26] The Court held that refusing Kras access to the bankruptcy court under these circumstances did not violate his rights under the fifth amendment due process clause. The obvious problem for the opinion writer, Justice Blackmun, was to distinguish *Boddie*. The principal points made in this effort were the following:

(1) It is legally impossible to secure a divorce except through a judicial proceeding. An out-of-court settlement by the parties will not dissolve the legal bond of marriage and thereby relieve the parties of various special duties and liabilities. By contrast, relief from the claims of creditors is in principle available through a negotiated com-

19. *Id.* at 376.
20. Loving v. Virginia, 388 U.S. 1 (1967).
21. Skinner v. Oklahoma, 316 U.S. 535 (1942).
22. Meyer v. Nebraska, 262 U.S. 390 (1923).
23. 401 U.S. at 379.
24. *Id.* at 380.
25. *Id.* at 381. The asserted and conceivable economic justifications for court access fees will be discussed in Part II, the sequel to this Article.
26. 409 U.S. at 454 n.6 (dissenting opinion of Stewart, J.) (quoting appellee's affidavit). Justice Blackmun's opinion for the Court, *id.* at 449, evinces a skeptical view of this uncontested avowal.

position, "however unrealistic the remedy may be in a particular situation."[27]

(2) Kras' interest in obtaining a bankruptcy discharge "does not rise to the same constitutional level"[28] as that of the *Boddie* petitioners in securing divorces. Inability to dissolve one's marriage seriously impairs exercise of constitutionally protected associational interests. But there is no constitutional right to a bankruptcy discharge, nor is the interest in obtaining one to be classed as "fundamental" so as to require the government to cite "compelling" interests to justify any special or "unequal" impediments it casts in the way of individuals seeking to realize that interest.[29]

(3) There is an apparent rational basis for the filing fee—namely, to make the system of bankruptcy referees self-sustaining through charges imposed on the system's users rather than through taxes on the public at large.

In the *Ortwein* case, the appellants were welfare recipients whose benefits had been reduced by county welfare agencies on grounds challenged by appellants both in law and in fact. The disputed cuts had mainly been upheld by the state Public Welfare Division after a hearing held at the request of appellants. Appellants then sought judicial review in the Oregon Court of Appeals, where general jurisdiction was lodged to review decisions of state administrative agencies. Review was denied for the sole reason that appellants failed to pay the standard twenty-five-dollar filing fee.[30] They had alleged without contradiction their inability to pay. The denial of review was affirmed by the Oregon Supreme Court and, on the appeal papers without full briefs and arguments, by the United States Supreme Court.

The Court's memorandum opinion made various points, including the following:

(1) The appellants' interest in increased welfare payments is not "fundamental."[31] It "has far less constitutional significance"[32]

27. *Id.* at 445.

28. *Id.*

29. *Id.* at 446. The impediment involved in *Kras* and the other cases here considered—a flat fee applicable to all members of a genuine class of would-be litigants—is not "unequal" in the most straightforward sense of that term. However, the Conrt has on certain occasions regarded as "unequal" the selective effects of flat fees in completely excluding the "functionally indigent" from governmentally provided benefits available to all who can afford the fees. This notion of inequality is considered in Part II.

30. This fee was required of all persons seeking to become moving parties (normally as "appellants") in the Court of Appeals. *See* 410 U.S. at 658.

31. *Id.* at 659.

32. *Id.*

than the *Boddie* appellants' interest in divorce with its associational affinities.

(2) As in *Kras* but not in *Boddie*, appellants in *Ortwein* had an alternative recourse "not conditioned on the payment of the fees."[33] The alternative named by the Court was not, as might have been expected, negotiation and out-of-court settlement with the county welfare agency. Rather it was the administrative hearing that had in fact been afforded by the state Public Welfare Division. The Court's meaning is not entirely clear, but it seems to have been equating the administrative appeal with a trial-level judicial-review proceeding. Thus, the appellants' request for judicial review would be analogous to one for an appeal.

(3) The filing-fee requirement, again, has a rational justification that is apparent: it "produces some small revenue to assist in offsetting" the costs of operating "the Oregon court system."[34]

In retrospect it seems that *Boddie* contained a basic methodological ambivalence, which *Kras* and *Ortwein* have since resolved. By anchoring his reasoning in *Boddie* to what he saw as the established procedural rights of defendants, Justice Harlan invited speculation that the Supreme Court might be in the process of evolving a general theory of constitutional protection for effective access to court—that the Court might be regarding a person's interest in judicial accessibility itself as one of those values whose realization the Constitution has placed within the special keeping of reviewing courts.[35] Recognition of constitutional protection for such an interest would not necessarily be contradicted by conditioning judicial protection for it in a particular case on the presence of a genuine or substantial need for relief, or on the absence of easily available alternative avenues to effective relief. On the other hand, the opinion's emphasis on the *absolute* lack of such alternatives and on the *fundamental* or *constitutional* importance of the relief sought, might have suggested that the Court was developing a quite different focus—that it might be restricting its concern to the interest particularly to be vindicated through the litigation at hand and might not be attending to any broader interest in litigation access as such. Perhaps it was only the interest particularly to be vindicated, and no other, that excited the Court's due process

33. *Id.*

34. *Id.* at 660.

35. This was the prognosis offered by one commentator. *See* LaFrance, *supra* note 15, at 536-37.

sensitivities; and it was only because, under the circumstances, the denial of court access was an unacceptable hindrance to the realization of that interest that the denial of access was held unconstitutional.

Whatever ambiguities may have been latent in the *Boddie* opinion have been resolved by the opinions in *Kras* and *Ortwein*. The Court has made plain its view that an indigent, would-be civil plaintiff must appeal to the interest at stake in a particular litigation, and not to a general interest in ability to litigate, in any effort to invoke constitutional protection against an exclusionary[36] court-access fee. A basic thesis of my essay is that the Court has erred in choosing to focus on the "interest" question rather than on the "access" question.

This Article is the first part of a two-part essay. In Part I, I shall try to show that the Court's effort to distinguish between civil-defendant and civil-plaintiff situations, and to differentiate among various plaintiff situations on the basis of the interests particularly at stake, has led the Court to rely on propositions which cannot be supported by appeal either directly to any constitutional text or mediately through any general principle which is persuasive in itself, let alone persuasively inferred from the Constitution. The more perseveringly one tries to make the Court's distinctions *seem* persuasive, the more those distinctions turn out to entail surprising resolutions of certain major, deep-lying, controversial, and perhaps unresolvable questions of jurisprudential and political theory and of legal sociology. There is no way of being sure whether the Court noticed these problems or whether it meant to decide them. There is a question whether such issues are even susceptible of judicial "decision."

All the foregoing, even if established, is not by itself proof of a further thesis: that the Court would have done better to acknowledge the question of a general right of judicial access than to worry about what litigation stakes under what circumstances amount in themselves to constitutionally protected interests. To show that the Court's attempts to differentiate between defendants and plaintiffs, or between "monopo-

36. In this Article I shall use the word "exclusionary" to mean the effect of a fee on a person who is functionally indigent—who does not pay the fee when he cannot pay it without depriving himself or his dependents of the day-to-day necessities of life. *See generally* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 19 (1973). This definition of indigency (though not the label "functionally indigent") was used in *Boddie* and *Kras*, and may be traceable to an earlier decision holding that a person need not be "wholly destitute" in order to enjoy the benefits of the federal statute allowing court appearances in forma pauperis. *See* Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 339-40 (1948).

lized" or "constitutional" plaintiffs and other plaintiffs, lead back to untenable premises does not exclude the possibility that there is *no* protection for judicial access (or none in civil cases), no matter what may be at stake. Yet as I shall try to show in Part II, which will be published at a later date, recognition of a general constitutional right of judicial access would harmonize with persuasive principle, traditional understandings, and developed constitutional doctrine, and would not be open to any really convincing objection.

B. What Is at Stake: Some Comments on Judicial Role

Why all this ruckus about such a pipsqueak issue as court access fees? After all, the practical importance of the fees is probably small. The number of persons who are genuinely excluded by the fees—who cannot pay them without foregoing life's necessities—may not be great. And even as to those persons, the fee problem is partially obviated in the federal and many state judicial systems by a more-or-less generously administered in forma pauperis practice.[37] Advances by lawyers working on contingent-fee contracts and the activities of legal-aid and public-interest law organizations take care of some of the remaining problems. By any practical measure, it is not primarily the fees imposed by states as a legal condition of access to court (the subject of this essay)[38] that impede effective litigation by the impoverished, but the far heavier costs of the legally optional, yet practically essential, equipage often needed for an effective presentation once the case is filed—attorneys' fees, chiefly, but consultant, expert witness, investigational, stenographic, and printing costs as well. Indeed, this comparison of access fees with equipage costs suggests a rationale for the Court's inhospitable attitude toward claims for access-fee relief—a rationale perhaps more persuasive than anything found in the Court's opinions.

Consider this line of argument: The access-fee question, precisely because it is short on practical significance, is highly tokenistic. Invalidating a filing fee while announcing constitutional protection for the right to litigate would be a hollow gesture in the absence of a fixed intention to grant future judicial relief in the really important context of equipage—so hollow, indeed so hypocritical, as to deserve

37. *See* 28 U.S.C. § 1915(a) (1970); Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331 (1948); Silverstein, *supra* note 4, at 33-49.

38. State-imposed access fees include not only filing fees but all payments, whether to state officials or others (such as process-servers, stenographers, printers, or bondsmen), for the privilege of access itself or for goods or services that are a legal condition of access.

the epithet "unprincipled." A promise of judicial relief for the equipage problems of impoverished civil litigants would, at any rate, be read into the invalidation of access fees. But that promise is one which the Court cannot and should not try to keep, because it would contort the judicial role unduly. The ultimate outcome of the whole adventure, then, would probably be damage to the Court's reputation for integrity and principled decision-making, without any significant improvement in the situation of impecunious, would-be litigants.[39]

That line of defense, while tempting, will not work. The reasons why it fails are just the reasons why this essay is worth writing. The most important failing is that the Court's opinions do not accord with the suggested rationale. Confronted with the *Kras* case on direct appeal,[40] the Court had no choice but to affirm or reverse. The Court might have denied Kras judicial relief and explained the denial in terms of concerns about judicial role. But that is not what the Court did. Far from sidestepping the question of a right to litigate out of a fear that to confront the question would be to grant the right and then to be swept on by such a decision to a point where no court ought to go, the Court confronted the question and concluded that there was no right. In support of that conclusion, the Court tendered reasons. Those reasons, in turn, have logical entailments. Inasmuch as the Court is supposed to act according to principle, those entailments aspire to the status of doctrinal principle. They are not self-evident, and I believe that when revealed they will surprise and, perhaps, alarm. To reveal them (let them alarm whom they will) is one of my purposes.

Moreover, it may not be true that the practical import of the Supreme Court's rejection, in the fee cases, of the litigation-right proposition is merely that the Court and lower federal tribunals will continue to refrain from providing judicial relief against filing fees in the handful of cases where fees have exclusionary effect. There has long been developing in our country, and there is perhaps now coming to a head, a political debate about the proper legislative response to those other, more important impediments to effective litigation which I have termed "equipage." It may be true that these expenses are not imposed by the state, at least not in the most direct sense, and

39. Professor LaFrance reports that the problem of drawing the line between access fees and equipage troubled the District Court in *Boddie*. LaFrance, *supra* note 15, at 510.

40. *See* 28 U.S.C. § 1252 (1970).

that underwriting their costs entails affirmative legislative actions that courts perhaps cannot prudently and properly undertake to demand. Yet an explicit assertion by the Supreme Court that the Constitution *means* to protect claims to effective court access—that such access is what is loosely called a "constitutional right," whether or not the right is judicially enforceable to the farthest limit of its logic—might well have influenced the legislative debate regarding legal services, just as the Court's apparent acceptance of the opposite conclusion may conceivably be influencing that debate in the opposite sense.[41]

But let me be forthright. I really do not mean to argue for the merely hypothetical proposition that *if* the Court was going to decide the access-fee issue on the merits, *then* it should have come out the other way (or at least had more defensible reasons for the conclusion it reached). Nor am I quite persuaded that the equipage problem is off-limits to the Court. I believe that the Court ought to have decided the fee question on the merits; that it ought to have decided against the constitutionality of exclusionary court access fees; that this would have been the principled course to take even were the Court quite convinced that it could never properly undertake to command the states to alleviate the equipage problems of impoverished litigants; and, finally, that the question of the Court's power to order the states to provide equipage is difficult enough that the Court should have been willing to reserve its judgment until actual cases both necessitated and provided a context for decision.

My views on the merits of the fee issue I shall defend at length below. I shall merely state here, and leave it for the reader to verify (or falsify) my statement, that in principle those views argue also for the right of at least some impecunious, would-be litigants to be provided at state expense with counsel and other practical necessities of effective litigation.[42] More particularly, my arguments against

41. It is not my contention that the Court ought to select its cases, or formulate its opinions, for the specific purpose of recognizing constitutional rights in order to influence legislative debate. I do suggest that the Court ought to act on the understanding that whatever it does say about constitutional rights—including the reasons, doctrinal and moral, that it offers in support of such declarations—may in fact influence legislative activity; and, indeed, that it is an important part of the Court's job to make the kinds of declarations that can exert such influence when the context is suitable and the legal merits clear. *Cf.* Michelman 997-98, 1002-03, 1015.

42. The need for equipage turns on a number of variables, including the litigant's personal capabilities, the complexity of the case, and the role assigned to the judge. No doubt there are some indigent litigants who would not require further assistance once the fee barriers were down and the litigants were in the judicial presence. It seems equally clear that for other indigent litigants, mere admission to the courthouse, without provision of equipage, will lack practical significance. Whether lines are to be

the Supreme Court's differentiation of civil plaintiffs in general from civil defendants in general—protecting the latter but not the former group from exclusionary access fees—seem also applicable to a like general differentiation with regard to claimed rights to counsel at state expense. That is, I ask the reader to consider whether, in the analogic light of the arguments I make below, it would be justifiable to rule that indigent civil defendants have a due process right to state-provided lawyers while civil plaintiffs have not that right. The question has some actual significance insofar as there are already signs of judicial recognition of civil defendants' right to counsel.[43] If my arguments are correct, either this development should be nipped in the bud, or the courts participating in it should steel themselves to extend it to the plaintiffs' side.

The argument I earlier suggested for the Court's refusing to invalidate exclusionary access fees rested in part on the suggestion that the second of those alternatives—judicial enforcement of a civil plaintiff's right to counsel—was out of the question because of its incompatibility with a proper judicial role. Now it certainly is true that from an institutional standpoint it is far easier to contemplate judicial relief from access fees than from inability to afford equipage. Judicial relief from access fees can always take a traditional, strictly "negative" form of ordering the state to dispense with some legal requirement it would otherwise impose. But judicial relief from equipage costs must, most clearly for civil plaintiffs but as well for civil defendants, take the "affirmative" form of requiring the state to undertake some combination of subsidizing the indigent's litigation costs and substantially restructuring its judicial system.[44] Although a wide

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drawn, where, and by what standards and processes, are just the questions whose existence bespeaks a cautious, case-by-case approach to the problem of equipage in civil litigation. See notes 45-46 *infra*. But the Supreme Court's fee decisions have virtually shut the door against *any* judicial approach to the problem of equipage for civil plaintiffs, except for those cases (if there are any in addition to divorce suits) able to slip through the eye of the *Kras/Ortwein* needle. I suppose it remains possible that the Court will cope with the equipage problem in civil-defendant contexts, and then, if it has coped successfully, reexamine its stance regarding plaintiffs. But denying access-fee relief to indigent plaintiffs in the meanwhile is not a necessary part of such a program.

43. *See In re* Ella B, 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972) (child neglect-custody proceeding). *But see* Robinson v. Kaufman, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (2d App. Dist. 1970), *cert. denied*, 402 U.S. 954, 964 (1971) (same issue; opposite result).

44. The need for affirmative relief rather sharply distinguishes the problem of equipage for civil plaintiffs from that of equipage for criminal defendants. *E.g.*, Douglas v. California, 372 U.S. 353 (1963). While a case like *Douglas* in a sense affirmatively obliges the state either to subsidize purchases of lawyering services on the

latitude for choice could be left to the state (with the court perhaps using the remedial device of an order to the relevant state authorities to produce a "plan" for the court's review)[45] and although the conclusion that a tremendous volume of resources would be judicially commandeered by such a decision should not be lightly accepted,[46] it is

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private market or else to institute a public legal aid program, that judicial demand can be handled with conventional prohibitory relief because it arises in the criminal prosecution context. The court can order the defendant released unless the legal services are somehow furnished.

It might appear that the equipage needs of civil defendants can likewise be handled by simple prohibitory relief: if adequate legal equipage is not bestowed on the indigent defendant, let the plaintiff be denied his relief. This approach, if valid, would undercut my claim that defendants and plaintiffs deserve like treatment with regard to equipage rights. But the approach is open to two serious objections. *First*, it would mean that an indigent litigant's right to equipage at state expense could turn on whether he finds himself in the litigating posture of plaintiff or defendant; and this fact is too much a matter of tactics and happenstance to be determinative of such important matters as access-fee relief and equipage rights. See text accompanying notes 112-14 *infra*. *Second*, there is patent injustice (and a denial of equal protection of the laws?) in denying the civil plaintiff his rights solely because of the state's failure in its duties toward the defendant. (Some might want to say that this last point applies equally in the criminal prosecution context: that it is similarly unjust to deny law-abiding society its rights because of the state's failure to equip the defendant. But this claim depends on the highly dubious premise that "society" has "rights" which are violated when the state chooses not to enforce its rules. Yet individual victims have rights, and it may be arguable that *those* rights are violated if the state both fails to enforce its penal law and denies the victim an opportunity to sue for reparation on the civil side. See text accompanying notes 146-49 *infra*.)

45. Insofar as the state decided to meet the problem by paying for additional legal services on behalf of indigent litigants, choices would be open regarding: the format for such provision (a judicare system, a public-payroll system, or whatever); determinations of eligibility (financial need, exclusion of certain kinds of matters because needed equipage is available without cost from private sources or because no equipage is needed); screening devices with which to replace the usual economic deterrent to frivolous or abusive litigation; or partial preservation of economic deterrents by obligating users of the system to repay the state for its use when and if able. The state could and doubtless would also consider ways of acquiring legal services for indigent persons without paying for them ont of the public treasury, such as expanded authorization of contingent-fee arrangements. Providing for indemnification of a winning party's equipage costs by the losing party might leave stranded an impoverished person with a respectable but debatable case, although in certain cases a state might provide for such indemnification, win or lose. *Cf.* Sierra Club v. Lynn, 5 Environmental Rptr. (BNA) 1745 (W.D. Tex., June 28, Aug. 24, 1973). Finally, the state could consider ways of meeting the problem which avoid, minimize, or cheapen additional purchases of equipage, such as expanded use of small-claims courts and nonjudicial tribunals where lawyers are not used, or altered regulation of legal services suppliers to reduce anticompetitive barriers and monopoly profits.

46. Insofar as the state responds by undertaking to pay for legal services, the use of eligibility standards, screening devices, and pay-back requirements could control outlays to some extent. If, in the interest of evenhandedness, prelitigation screening more intense (or earlier) than that now accomplished by pretrial dismissal motions were

certainly imaginable that a conscientious court would conclude that the decision would place too great a strain on its competency. Whether that would be a correct conclusion seems to depend in part on how powerful one finds the arguments supporting the indigent plaintiff's right (in principle) to be equipped at state expense.

Yet even if it were a foregone conclusion that judicial enforcement of equipage rights is unthinkable, the judicial duty to invalidate exclusionary access fees would remain unimpaired. We imagine a judge convinced of three things: (1) as a matter of substantive principle, everyone has the right not to be excluded from the litigation forum by state-imposed fees; (2) the same principle also shows that persons who have gained access to the litigation forum have the right to be provided with the requisite equipage, at state expense if one cannot afford it privately; and (3) as a matter of institutional principle, the court must not undertake enforcement of the second right, though there is no institutional difficulty in enforcing the first right.

There seem to be two alternative courses that the judge can follow. On the one hand, he can honor the substantive principles establishing that court access is a constitutional right, just up to but not beyond the point where those principles are thought to be overwhelmed by the other institutional principles that limit the judicial role. On the other hand, the judge can refuse all enforcement of the substantive principles, even in cases where the institutional principles are not threatened, in order to obviate a "line-drawing" problem. Conceivably there is some way of explaining why the second course does not deserve to be called unprincipled. But surely the first course powerfully resists that epithet. For it is widely thought that the kinds of principles that are supposed to govern judicial action come not as isolated monads but as complexes or webs of interrelated principles; that however sovereign such a complex may be with respect to the judge, none of the component principles in the complex is sovereign vis-à-vis the other principles; that each component principle holds its sway in a region bounded by the reach of other principles in its complex; that it is just the judge's job to determine the respective hegemonies of the

extended to all litigants, the result might be some saving in both public and private litigation costs. The same might be true if the state undertook to steer a larger share of its legal controversies to tribunals where equipage needs are held under restraint. Also to be kept in mind is the possibility that expansion of the ability of impoverished persons to vindicate their legal rights would effect a saving in the social costs of violations thereby deterred, a result which would to some extent offset any increases in total outlays on litigation and related activities. For a general framework and guide for considering such questions, see POSNER ch. 24; Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUDIES 399 (1973).

principles in cases of arguable overlap;[47] and that the judge acts "neutrally" (where "neutral" is the contrary of "unprincipled") precisely insofar as he is able to make that determination conform to some objective criterion.[48] If there is a complex which includes both "substantive" principles establishing a right to litigate effectively and "institutional" principles establishing limits on (but not totally excluding) judicial enforcement of such a right,[49] why may not the judge—why *must* not the judge—give *each* body of principles its due?

PART I: SPECULATIONS ON THE JURISPRUDENTIAL UNDERPINNINGS OF THE FEE DECISIONS

A. The Nature and Method of the Search

1. The Object of Search

Let us begin with a concise statement of what needs explaining: it is an emergent rule regarding claims by indigent persons that they be relieved of court access fees. The rule defines a subgroup (call it *X*) of all persons, such that whenever a person is within *X*, that person is denied due process if he is refused access to court because of inability to pay a state-imposed fee. Enlightened by *Boddie, Kras, Ortwein,* and a number of prior decisions, we can say that *X* means any of the following: a defendant in criminal proceedings, a defendant in civil proceedings,[50] or a plaintiff in civil proceedings seeking vindication of a constitutionally favored or "fundamental" interest where relief is unobtainable extrajudicially.[51]

The challenge is to see how this rule can be persuasively explained. I do not think it can be. My counter-thesis is that if *X*

47. *Cf.* Dworkin, *The Model of Rules,* 35 U. Chi. L. Rev. 14, 34-40 (1967); Henkin, *Foreword: On Drawing Lines,* 82 Harv. L. Rev. 63, 63-65 (1968).

48. *See* Michelman 1015-17.

49. For illustration of a complex including both bodies of principle, see *id.* at 991-97.

50. I know of no case holding that defendants may not be excluded by appearance fees. See notes 4-5 *supra* and accompanying text. (Perhaps no state has ever insisted on payment of such a fee when it would have been exclusionary.) The reasoning of the *Boddie* opinion nevertheless proceeds from the assumption that exclusionary application of an access fee to a defendant would be unconstitutional. A like conclusion is strongly suggested by *Fuentes.* See note 7 *supra.*

51. At this time, it is not perfectly clear whether a plaintiff must show both a favored interest and a lack of extrajudicial recourse in order to benefit from the *Boddie* ruling, or whether satisfying one of those two criteria is enough. For my purposes this question need not be resolved, since I mean to show that the emergent rule is untenable on either reading.

includes these parties, it must also include an additional group of civil plaintiffs so broad and inclusive that one might as well refer to civil plaintiffs generally.[52] By "must" I mean that I can think of no combination of plausible moral principles which can explain or justify the emergent rule without strongly implying its extension to civil plaintiffs generally. (My challenge to readers, then, is for them to think of such a combination, if they can.) By a moral principle, I mean a general statement with normative content, one which might take the following form: "It is (not) right (or good, or just, or expedient) that (a certain class of persons) (under certain circumstances) (be accorded certain treatment)." It is a form of statement which might be suitable as a sentence in a constitution, aimed at establishing some sort of personal right. But actual constitutional texts are ignored for the time being. In Part I, I seek to persuade only that there is no plausible moral view, simple or complex, that will explain or justify the rule that differentiates between *X* and civil plaintiffs generally. Success in that endeavor will not itself establish that indigent civil plaintiffs generally are constitutionally entitled to access-fee relief, but it will be an important step along the way.

2. The Principles To Be Examined

The process I have undertaken and have tried to recreate in the following pages is one of progressively strenuous, progressively refined attempts to formulate principles capable of explaining the emergent rule. One begins at or near the surface of the Court's opinions, testing a principle immediately suggested by the Court's own formulations. This suggestion is rejected, and a somewhat more imaginative or more refined formulation is then attempted. The process of successive rejection and reformulation continues until obscure depths (or dizzying heights) are reached where neither rejection nor acceptance of the imagined principle is possible, but only amazement that the principle (or if not it, then some equally astounding alternative) could turn out to be a necessary postulate for a decision of the Supreme Court.

A principle may be rejected either because it simply fails to explain the emergent rule even if valid ("fails descriptively") or because the content of the principle is defective ("fails substantively").[53] Substantive failure may flow from either or both of two con-

52. See notes 191-98 *infra* and accompanying text.

53. A principle may fail descriptively by "proving too much." See notes 103-05 *infra* and accompanying text. That any single principle fails in this way is not a

siderations: (1) the principle is inconsistent with other Supreme Court doctrines ("inconsistent") and (2) the principle seems intuitively wrong ("implausible").

Using the foregoing paraphernalia, a reasonably simple map may be provided for the discussion which follows. Principles are considered in the order of their numerical designations.

Principle I:[54] A person is entitled to a judicial hearing when he cannot by extrajudicial means obtain relief to which he may be lawfully entitled. In other situations, exclusion by access fees is permissible. (This principle fails descriptively,[55] and its plausibility is highly dubious.[56])

Principle II:[57] A person is entitled to a judicial hearing when denial will result in an adverse, legally final determination of that person's legal claims or defenses. In other situations, exclusion by access fees is permissible. (This proposition fails substantively for both inconsistency[58] and implausibility,[59] and it also fails descriptively.[60])

Principle III:[61] A person's claim to a judicial hearing is stronger when his legal proposition represents one of his individual rights than when it represents a mere prosecutorial role in a deterrence program having social welfare objectives. (Principle III fails descriptively.[62])

Principle IV:[63] A person's claim to a judicial hearing is stronger when his object in litigating is prevention of an impending violation of his rights than when it is merely reparation for past violations of his rights. (This principle fails substantively for inconsistency[64] and, perhaps, implausibility.[65] It also partly fails descriptively.[66])

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conclusive argument against its validity. There might be a group of two or more principles which combine in such a way as to explain the emergent rule, even though any one of them taken by itself, without the limitations introduced by the others, would prove too much. It turns out, however, that attempts to combine the principles intimated by the Court lead to extreme implausibility, as the text from time to time will point out. See notes 159-60 *infra* and accompanying text.

54. See text accompanying notes 100-05 *infra*.
55. See text accompanying notes 103-05 *infra*.
56. See notes 100-02 *infra* and accompanying text.
57. See text accompanying notes 106-14 *infra*.
58. See notes 107-09 *infra* and accompanying text.
59. See notes 110-14 *infra* and accompanying text.
60. See pp. 1181-82 *infra*.
61. See text accompanying notes 115-28 *infra*.
62. See notes 118-20 *infra* and accompanying text.
63. See text accompanying notes 129-38 *infra*.
64. See notes 132-38 *infra* and accompanying text.
65. See notes 129-31 *infra* and accompanying text.
66. See note 151 *infra*.

Principle V:[67] It is more important to assure judicial hearings for those seeking to prevent the state from actively violating their rights than to assure such hearings for those seeking merely to rouse the state from its passive failure to protect their rights. (Both the plausibility and the descriptive applicability of this principle are extremely dubious.)

Principle VI:[68] The importance of assuring ability to litigate varies with the importance of the damage to a person's life which might result from lack of such assurance. (This proposition is quite plausible; but it fails descriptively.)

Principle VII:[69] Assurance of judicial hearings is more important for those seeking to vindicate constitutional rights than for those urging other legal rights. (This principle fails descriptively[70] and also fails substantively for implausibility.)[71]

3. How Principles Are Tested: Litigation Values

One cannot hope or pretend to differentiate among potential litigation contexts, with a view to ranking those contexts according to the urgency or desirability of applying to them measures aimed at facilitating actual litigation (of which access-fee relief for indigents is one), without believing that there are generally accepted *reasons* for making litigation possible. I think we take little risk of serious distortion if we try to frame those reasons in terms of the values (ends, interests, purposes) that are supposed to be furthered by allowing persons to litigate.

I have been able to identify four discrete, though interrelated, types of such values, which may be called dignity values, participation values, deterrence values, and (to choose a clumsily neutral term) effectuation values. *Dignity values* reflect concern for the humiliation or loss of self-respect which a person might suffer if denied an opportunity to litigate. *Participation values* reflect an appreciation of litigation as one of the modes in which persons exert influence, or have their wills "counted," in societal decisions they care about.[72]

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67. See text accompanying notes 139-50 *infra*.
68. See text accompanying notes 151-58, 191-98 *infra*.
69. See text accompanying notes 159-90 *infra*.
70. See note 159 *infra* and accompanying text.
71. See notes 160-86 *infra* and accompanying text.
72. *See* Fuller, *Collective Bargaining and the Arbitrator*, in COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE 8, 24 (M. Kahn ed. 1962); Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617, 631 (1973).

Deterrence values recognize the instrumentality of litigation as a mechanism for influencing or constraining individual behavior in ways thought socially desirable.[73] *Effectuation values* see litigation as an important means through which persons are enabled to get, or are given assurance of having, whatever we are pleased to regard as rightfully theirs.

In dealing first, and preliminarily, with dignity and participation values, I simply assume that these values do, to some non-negligible extent, help shape general, conventional, and popular notions of what litigation is "for." My main, and limited, purpose is to show that neither of these two types of values can by itself easily explain the emergent rule of *Boddie, Kras,* and *Ortwein.* I also observe in passing that each type can contribute something positive toward the argument for a broadly conceived right of court access. I thereafter turn to the effectuation and deterrence values, which seem superficially likely to explain or justify the emergent rule but whose assiduous pursuit leads to those deep theoretical conundrums I have mentioned.

Dignity values. These seem most clearly offended when a person confronts a formal, state-sponsored, public proceeding charging wrongdoing, failure, or defect, and the person is either prevented from responding or forced to respond without the assistance and resources that a self-respecting response necessitates.

The damage to self-respect from the inability to defend oneself properly seems likely to be most severe in the case of criminal prosecution, where representatives of civil society attempt in a public forum to brand one a violator of important societal norms. Thus, if the fee decisions on the criminal side are to be justified by dignity values (as seems perfectly plausible),[74] these holdings may not have any controlling significance for the civil side.

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73. A possibly more accurate (but less distinct) label would have been "social welfare values." The category is intended to stand for all interpretations of litigation as a means for maximizing value across society, as distinguished from securing to the victorious party his due. In a given case, value maximization might be effectuated through an act of redistribution of wealth (the immediate impact of the judgment or decree itself), rather than through an act of (negative or affirmative) deterrence strictly speaking (the impact on future behavior of knowledge of the decision and its grounds).

The contemporary literature on a social-welfare, or "economic," or "deterrence" interpretation of law is voluminous and growing. A significant portion of this material, and citations to much of the rest, can easily be found by scanning the *Journal of Law and Economics* and the *Journal of Legal Studies* (each since its inception). For two impressive book-length presentations, see G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970), and POSNER.

74. The Supreme Court's sensitivity to dignity values in criminal contexts is suggested by its recent decision in United States v. Ash, 413 U.S. 300 (1973) (no re-

Of course, one immediately sees that there are some nominally "civil" contexts where the would-be litigant is trying to fend off accusatory action by the government threatening rather dire and stigmatizing results (for example, a proceeding to divest a parent of custody of a child on grounds of unfitness), which are exceedingly difficult to distinguish from standard criminal contexts in dignity value terms.[75] Still these cases do not by themselves show that the dignity notion is uncontainable. Challenging though it may be in a few cases to draw the line between the quasi-criminal and the noncriminal context, the determination usually will not be insuperably difficult.

But this is hardly to say that dignity considerations are entirely absent from civil contexts. Perhaps there is something generally demeaning, humiliating, and infuriating about finding oneself in a dispute over legal rights and wrongs and being unable to uphold one's own side of the case. How serious these affects are seems to depend on various factors including, possibly, the identity of the adversary (is it the government?), the origin of the argument (did the person willingly start it himself?), the possible outcomes (will the person, or others, feel that he has been determined to be a wrongdoer?), and how public the struggle has become (has it reached the courts yet?).

That listing of factors might seem to lend a degree of plausibility to a general right of court access for civil defendants though not for civil plaintiffs. But the idea is really not very persuasive on close inspection. Consider Ortwein's situation. He was not accused of any crime. Indeed, the government was able to work its will against him without starting any public proceeding; the choice to take the dispute to a public forum was Ortwein's own. On the other hand, Ortwein's adversary was the government; and the government's actions did imply that he was demanding more than his lawful entitlement.[76] That a person's self-respect might be seriously injured by inability to have that charge tested in a credibly impartial tribunal seems entirely likely.

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quirement that counsel be present at post-indictment photographic identification proceeding where accused is not present), which should be compared with United States v. Wade, 388 U.S. 218 (1967) (right to have counsel present at lineup proceeding). The *Ash* opinion suggests that one reason for treating the two cases differently is that an accused has a special need for the support of counsel when subjected to a "trial-like confrontation." 413 U.S. at 312-13.

75. *See* cases cited note 43 *supra*; Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253, 270 (1968).

76. The situation illustrates a more general point made below: there is no particular reason to assume that the party to a controversy who becomes plaintiff in a lawsuit is "the aggressor" in the controversy viewed in its entirety. See text accompanying notes 112-14 *infra*.

Nor does it seem that such a likelihood can readily be ruled out in various other plaintiff contexts that easily come to mind: a citizen wishes to sue a governmental body for breach of contract or for tax refund; a customer wishes to sue an automobile mechanic for breach of warranty; a member wishes to challenge his expulsion from a private association (or a worker, his dismissal from private employment); a tenant wishes to sue his landlord for having evicted him for a malicious or erroneous (and allegedly unlawful) reason; an aggrieved party wishes to sue another for defamation, or for assault, or for malpractice, or for breach of trust. It seems that denial of access would noticeably arouse dignity concerns in all these cases.[77] No doubt, there are variations in the degree of injury, depending on permutations of relevant factors; but dignity concerns seem widespread through the juridical sector.

Participation values. The illumination that may sometimes flow from viewing litigation as a mode of politics has escaped neither courts[78] nor legal theorists.[79] But I can see no way of trenchantly deploying that insight so as to rank litigation contexts for purposes of a selective access-fee relief rule.[80] (Certainly the Supreme Court's emergent rule cannot be construed to reflect any such ranking.)

But if participation values cannot help us differentiate among litigation contexts, they can contribute significantly to the argument for a broad constitutional right of court access. Participation values are at the root of the claim that such a right can be derived from the first amendment,[81] a claim that I shall not pursue. And they also help inspire the analogy between general litigation rights and general voting rights, a theme upon which I shall rely heavily in Part II.

Deterrence values. Litigation is often, and enlighteningly, viewed as a process, or part of a process, for constraining all agents in society to the performance of duties and obligations imposed with a view to social welfare. A possible link between deterrence values and access

77. *Cf.* Willging, *supra* note 75, at 270-71.

78. *E.g.*, NAACP v. Button, 371 U.S. 415 (1963).

79. See note 72 *supra.*

80. Someone might suggest that in litigation dominated by "public interest" objectives there is no urgent need to assure participation by any particular indigent individual. But eminent moralists insist, and the legal order's treatment of voting rights confirms, that participation values are weighty in public interest contexts. *See* Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Michelman 995-96 (discussing J. RAWLS, A THEORY OF JUSTICE (1971)).

81. *See* Note, *A First Amendment Right to Access to the Courts for Indigents,* 82 YALE L.J. 1055 (1973).

fees is, of course, supplied by the obvious frustration of those values which results if the person in the best position, or most naturally motivated, to pursue judicial enforcement of such constraints is prevented by access fees from doing so.[82] The pervasiveness of deterrence factors throughout the juridical sector, like that of dignity and participation factors, adds force to the argument for breadth or generality in any right of court access. In order to establish beyond serious debate that society's interest in constraining agents to the performance of legal duties has a nigh universal relevance, one need only refer to the lively contemporary interest in a "cost-internalization" rationale for tort law,[83] to the related literature that would connect the very definition of legal rights to a goal of economic optimizing,[84] and to the utilitarian considerations commonly thought to support the imperative of *pacta sunt servanda*.[85]

As we shall see, this very universality means that deterrence theory cannot convincingly differentiate among litigation contexts, so as to rank them for access-fee relief purposes. (It would be fun, but false, to turn the deterrence perspective against the Supreme Court's emergent rule by suggesting that deterrence is a function served by *plaintiffs*, not *defendants*, so that civil plaintiffs have a *stronger* claim for access than defendants have. Alas, affirmative defenses and vigorous defense, the risk or prospect of losing a lawsuit and so remaining "liable" for injuries actually sustained,[86] play no less important a part in deterrence schemes than does the risk or prospect that liability will be shifted.)[87]

Effectuation values. In the effectuation perspective we view the world from the standpoint of the prospective litigant as distinguished from that of society as a whole or as a collectivity. Value is ascribed to the actual protection and realization of those interests of the litigant which the law purports to protect and effectuate (in this perspective one would shamelessly refer to those interests as the liti-

82. But a stern economic approach might nevertheless conclude that, on the whole, access fees are beneficial. See notes 110, 118-20 *infra* and accompanying text.

83. *See, e.g.*, Michelman, *Pollution As a Tort: A Non-Accidental Perspective on Calabresi's* Costs, 80 YALE L.J. 647, 667 & n.32 (1971).

84. *E.g.*, Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Demsetz, *Wealth Distribution and the Ownership of Rights*, 1 J. LEGAL STUDIES 223 (1972).

85. 2 R. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 578, 615-17 (1914).

86. This is the appropriate usage of "liability" in the economic interpretation of law. *See, e.g.*, G. CALABRESI, *supra* note 73, at 137.

87. *See, e.g.*, POSNER 92-93, 323-25; Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUDIES 205, 207 (1973).

gant's "rights") and more generally to a prevailing assurance that those interests will be protected; and litigation is regarded as a process, or as a part of a process, for providing such protection and assurance. Notions of necessary legal protection for rights may be intuitive or philosophically elaborated. Elaborations may range from the extremely abstract and deontological (inferring legal rights, say, from a transcendental Idea of Freedom)[88] to the borderline utilitarian (viewing rights as necessary to the preservation of a satisfying social order).[89] They may vary in tone and emphasis from the legalistic (strict social contract theories,[90] or looser contractarian theories which entail legal protection for rights as a necessary part of the ethical justification for civil society's coercive aspects)[91] to the humanitarian and psychologically oriented (rights regarded as one of the lenses through which we view and find meaning in, or media through which we express and give meaning to, our notions of self, personality, social relationship).[92] However articulated, defended, or accounted for, the sense of legal rights as claims whose realization has intrinsic value can fairly be called rampant in our culture and traditions. Of course, this sense is aroused more naturally and appropriately by some claims and predicaments than by others;[93] and that phenomenon suggests the possibility of accounting for a selective rule of access-fee relief by reflection on effectuation values.

B. PLAINTIFFS VIS-Á-VIS DEFENDANTS

Consider the class of all persons proposing to enter the litigation arena against nongovernmental adversaries[94] in contexts involving neither "constitutional rights"[95] nor any need for a special type of relief

88. *See* I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 35-39, 43-45, 53, 55-64 (J. Ladd transl. 1965). There can be no disagreement with Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500, 522 (1973), that Kant's ethical philosophy as a whole is "duty-based" rather than "right-based." Yet Kant seems to find it possible, all the same, to found the jurisprudential component of his moral system directly on a notion of rights itself derived from the notion of duty.

89. *See* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1208-10 (1967) (discussing David Hume).

90. *See* J. LOCKE, THE SECOND TREATISE OF GOVERNMENT (T. Peardon ed. 1952).

91. *See* R. NOZICK, ANARCHY, STATE, AND UTOPIA (forthcoming 1974).

92. *See* Tribe, *Policy Science: Analysis or Ideology*, 2 PHILOSOPHY & PUB. AFFAIRS 66, 86-90 (1972).

93. *See* E. CAHN, THE SENSE OF INJUSTICE 24-27 (paper ed. 1964).

94. The reasons for this qualification have already been outlined. See note 15 *supra.*

95. The elusiveness of this concept need not detain us right now. See notes 161-65 *infra* and accompanying text.

obtainable only through court proceedings. By its opinions in *Boddie*, *Kras*, and *Ortwein*, the Supreme Court has evidently propounded a doctrine under which the court-access rights of members of this class are to be largely determined by dividing them into the two subclasses of plaintiffs and defendants. Defendants have a strict constitutional (due process) right of guaranteed access, assuring them not only that they will have adequate notice and a fair opportunity to be heard[96] but also that their opportunity will not be frustrated by court fees which they cannot afford to pay.[97] Plaintiffs, on the other hand, are denied the last assurance. (Plaintiffs, of course, have no need for assurance of notice. Questionable restrictions on the hearing formats afforded plaintiffs can rarely, if ever, have arisen; but if they were to arise, one imagines the Court would treat them under prevailing due process notions.[98] It would be more than a little surprising, though perhaps not inconceivable, to find the Court saying that plaintiffs must accept such hearing formats as are offered, no matter how seemingly inadequate or unfair, because normally a plaintiff's engagement in litigation is, if not exactly a privilege, also not an overpoweringly urgent need. Yet something like that is what the Court seems to be saying about plaintiffs who find themselves frustrated by exclusionary fees instead of by procedural formats.)

The question now to be addressed is whether either effectuation values[99] or deterrence values afford any plausible basis for thus generally distinguishing between defendants and plaintiffs. I first consider whether this distinction can be justified by using the notion of judicial monopolization of recourse which has been a prominent theme in the Supreme Court's opinions.

1. Judicial Monopoly

The monopoly notion is disarmingly simple. Divorce, the relief sought in *Boddie*, is different from most other kinds of affirmative relief that anyone might require, in that it is absolutely unavailable except in the form of a judicial decree. It takes judicial action to dissolve a marriage, but not to release a creditor's claim. The divorce-

96. This was the question involved in many cases cited by the *Boddie* Court confirming the due process rights of defendants. *See* 401 U.S. at 377-79 & nn.3-6.

97. See note 50 *supra*.

98. There is also the possibility, in certain circumstances, of challenge under the equal protection clause. But *cf.* Lindsey v. Normet, 405 U.S. 56 (1972).

99. Effectuation values, in this context, should be viewed as complemented or illuminated by dignity or participation values.

seeker has a peculiarly urgent need for court access because there is literally no other avenue to relief.

Now to some observers,[100] this attempt to limit the reach of *Boddie* fairly passeth understanding. The court, after all, usually has a monopoly on lawful deployment of *remedial force*; and this monopoly applies to plaintiffs across the board. An indigent insolvent person, for example, has alternative avenues to relief from debts only on the assumption that his creditors are not unyielding. But why should they yield, since he is indigent and, by holding out, they cannot get less than they would get out of bankruptcy?[101]

Or consider the case of an impoverished person who objects to emission of poisonous gases near his residence, a situation which he thinks constitutes an actionable nuisance. Not only is out-of-court settlement unavailable unless the alleged nuisance-maker is disposed to negotiate, but, more generally, the clearer it becomes that the complaining party lacks both the money to buy out the nuisance and the equipage to conduct an effective lawsuit, the less pressure there will be on the offender to turn his thoughts toward settlement.[102] The same reasoning seems to hold for a broad spectrum of imaginable controversies.

At any rate, it is apparent that the "monopoly" factor which activates special access rights for divorce suitors refers strictly to the legal possibility, and not the practical likelihood, of extrajudicial relief. To be sure, there is nothing internally illogical or incoherent in such a notion. Its defect is not that it is unintelligible, but, quite as fatal, that it is unpersuasive—that it lacks any external coherence with the context of common understandings within which it arises. This shortcoming is strongly suggested by a review of the Court's own derivation of the monopoly notion. The notion appears to have been conceived by Justice Harlan for a specific argumentative purpose, that of assimilating the predicament of the *Boddie* petitioners to the plight common to civil defendants—a comparison deemed significant because of an initial assumption that civil defendants generally enjoy constitutional

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100. *See* Boddie v. Connecticut, 401 U.S. 371, 387 (1971) (concurring opinion of Brennan, J.).

101. *See* United States v. Kras, 409 U.S. 434, 455 (1972) (dissenting opinion of Stewart, J.). Why didn't the *Kras* dissenters notice and mention that the *Boddie* petitioners also had available an extrajudicial way around their problem? (Could they not have *begged* the cash required for filing fees?)

102. *See* Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223, 234 (1970); *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 40, 104, 106 (1971).

protection against exclusionary court access fees, the very protection that the *Boddie* reasoning meant to extend to divorce suitors.

Judicial monopoly, then, was conceived as the common element mandating for divorce suitors the same protection against exclusionary court fees as the generality of defendants enjoy. Just as a person once married cannot become unmarried without gaining access to a court, so a person once haled into court cannot avoid an adverse judgment without making an appearance.

But is the latter proposition true? Quite plainly it is not, except in a nontechnical, empirically contingent sense: that is, it contains a factual assumption that the defendant will fail in any attempt to gain relief by negotiating an out-of-court settlement accompanied by a voluntary nonsuit.[103] To be sure, that assumption seems likely to be true as a practical matter whenever a defendant is so short of funds as to be effectively excluded by court fees. For why would a plaintiff agree to settle when a default judgment (or financially crippled defense) could be anticipated?[104] It is easy to see the considerations —of effectuation and of deterrence—that argue for invalidating exclusionary access fees as applied to civil defendants. *But then how is the situation any different for the generality of civil plaintiffs?* If *practical* lack of alternative recourse is what justifies access-fee immunity for indigent civil defendants (such immunity being the very premise from which the *Boddie* analogy proceeds), by what transformation do we arrive at the conclusion that *technical* lack of alternative recourse is what it takes to justify analogous relief for indigent civil plaintiffs? Monopoly in the technical sense, while it succeeds in discriminating divorce suitors from the generality of plaintiffs, utterly fails to distinguish the latter group from civil *defendants*; and civil defendants are the very group whose established (or assumed) due process rights provided the major premise for the *Boddie* syllogism,[105] insofar as "monopoly" is operative in that syllogism.

Well, perhaps "utterly" is too strong. When a defendant suffers a default judgment, or makes an inept defense and loses, the harm

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103. *Cf. The Supreme Court, 1970 Term*, 85 HARV. L. REV. 40, 106 (1971).

104. He might settle for something close to a complete victory. Are we, in deciding whether a party has any extrajudicial recourse available, supposed to apply any criteria of fairness or reasonableness to the hypothetical private settlement? Could the *Kras* Court have given any satisfying answer to that question?

105. All civil litigants who have no extrajudicial recourse are protected against exclusionary access fees. Divorce suitors, like defendants generally, are civil litigants who have no extrajudicial recourse. Therefore, divorce suitors are protected against exclusionary access fees.

he incurs (and the accompanying loss of deterrence) has the peculiarly vexing quality of legal finality: however legally unjustified may be the imposition on the defendant's interests, however legally valid the opposing claim or defense he might have asserted, legal recourse will henceforth be denied. In contrast, whatever harm has been suffered by the would-be plaintiff who is barred from court by access fees (the supposed tort, breach of contract, or whatever) remains a possible topic for legal recourse at some future time.[106] Thus it can be said that there *is* a kind of judicial monopoly confronting indigent civil defendants but not indigent civil plaintiffs—that is, control of the only practical avenue of possible escape from a judicially final, adverse determination of claims and defenses.

It is thus possible to make an intelligible, descriptive statement, containing judicial monopoly as an operative notion, which factually differentiates between defendants and plaintiffs. But does the statement, however, descriptively intelligible, also *justify* the differentiation that it describes? A number of considerations can be marshalled to show that it does not.

First, to conceive of the monopoly factor in terms of the imminence of legal finality only serves to aggravate our problems with the *Boddie* rationale. No monopoly element of the "finality" sort can be found in the *Boddie* situation. Had the fees there not been invalidated, the petitioners' right eventually to sue for divorce would not have been prejudiced. Thus "monopoly," if taken as an element which detaches divorce contexts from the generality of civil plaintiff contexts and assimilates the former to civil defendant contexts instead, must have a remarkably complex meaning—something like: "in defendant contexts the *practical* inability to *avoid finality* extrajudicially, and in plaintiff contexts the *technical* inability to gain *affirmative relief* extrajudicially." No reason comes readily to mind why practical inability to avoid finality should be equated with technical inability to gain affirmative relief. Indeed, the equation seems so artificial as

106. For commentary advancing the idea that legal *finality* is the precise impact which the state may not inflict without a prior due process hearing, see Dunham, *Due Process and Commercial Law,* 1972 SUP. CT. REV. 135. Insofar as Professor Dunham means to explain and limit *Fuentes* by this thesis, he seems to be hindered by the facts mentioned previously. See notes 7, 9 *supra.* Hindered, but perhaps not defeated. For Dunham would apply his principle to require a prior hearing whenever the state would clothe a person with "diminished responsibility" for the results of his action pursuant to court order, including, it seems, such results as personal injury caused by overzealous recovery tactics. *Id.* at 151. And it does not appear from the Court's opinion whether the statutes invalidated in *Fuentes* conferred that sort of immunity or not.

to deserve overwhelming suspicion that it has been invented for the sole purpose of rationalizing ("describing" is really more accurate) the joint results of *Boddie* and *Kras*, or of *Boddie* and *Ortwein*.

Second, there is reason to doubt that the threat of judicial finality has normally been regarded as a critical factor in due process appraisal of a person's demand for an opportunity to be heard. No such factor is present when hearing opportunities are sought in order to contest pending administrative action such as dismissal from employment or seizure of one's property (for if the dismissal or seizure is later found wrongful by a reviewing court, the court can usually award compensatory relief); yet due process is held to guarantee hearing opportunities in many such contexts—presumably because effectuation and deterrence values are better served by requiring hearings at the admittedly nonfinal level of administrative decision than by relying solely on judicial review.[107]

Following the lead of *Fuentes v. Shevin*,[108] we might say that what this shows is not that finality is not a crucial factor, but rather that temporary (though compensable) abeyance in the enjoyment of one's rights (which will occur "finally" if the dismissal or seizure goes forward, even if subject to the possibility of later reversal) is of no less concern than permanent abeyance in the due process calculus. The interim deprivation is "final" in the sense that eventual reparation cannot restore the world to its predeprivation state. But the postponement of an indigent plaintiff's lawsuit just as clearly subjects him to the risk of a "final" deprivation of the enjoyment of his rights over a given period of time.[109]

Third, effectuation values seem unlikely to be assuaged by the hypothetical possibility of future judicial recourse, once such recourse is seen to have been placed out of reach not only for the time being but for the incalculable future. To accord critical weight to absence of a finality threat seems quite unreasonable unless it can fairly be assumed that the condition presently barring access to relief will in all likelihood disappear soon enough that relief will still be timely.[110] But

107. *Cf.* POSNER 334.

108. 407 U.S. 67 (1972).

109. When the plaintiff is seeking monetary, compensatory relief for some already consummated injury, it might seem that postponement is merely postponement, and not irremediable deprivation. But if that relief is something to which one is *entitled* (see notes 132-38 *infra* and accompanying text) involuntary delay in recovering it seems no less an irremediable deprivation than involuntary delay in receiving possession of a chattel.

110. Insofar as rights and their recognition and enforcement are valued for their bearing on the self-concept of the rights-holder (see text accompanying notes 88-93

such an assumption seems arbitrary where the access-defeating condition is a would-be litigant's financial incapacity (interacting with an access fee). What law of nature or fact of human experience suggests that such a condition tends to be temporary?[111]

Fourth, and I believe most fundamental, the respective litigating

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supra & text accompanying note 158 *infra*), it may truly be that justice delayed is justice denied. Perhaps the experience of finding deserved relief unobtainable when you reasonably want it is irreparable.

Insofar as violations are compensable in money, and money judgments carry interest from the time of the violation, delay in recovery will not impair overall deterrence if the interest rate is appropriately fixed. Of course, deterrence will be impaired insofar as meritorious actions are never brought; and extended delay may progressively impair the victim's incentive or ability ever to bring his action apart from whether he eventually becomes able to pay the access fees. (On this point, too, the fixing of the interest rate is important.) However, this impairment of deterrence may be thought a price worth paying for the beneficial screening effect of access fees —their effect of weeding out claims whose administrative costs of adjudication and enforcement (including the parties' time and trouble) are not worth their marginal contribution to deterrence.

111. How is the problem affected by statutes of limitations? Imagine that petitioner *A* in my story (see text accompanying notes 4-15 *supra*) has been unable to afford the filing fee at any time since the company took the car and that the statutory limitations period for tort actions is about to expire. Does the court now grant relief from the fee? What reasoning argues for granting such relief just at the moment—and not a moment sooner—when, according to legislative judgment, evidence is turning stale and men's estates should at last be quieted? The court could complicate, though not avoid, this embarrassment by continuing to uphold the fee requirement but, in effect, writing a new "tolling" provision into the statute of limitations which would suspend the running of the period for as long as the potential plaintiff continues unable to afford the fees. Again, one would want to know what reasoning justifies this form of access-rights protection (which overrides *pro tanto* the legislative judgments embodied in the limitations statute) that does not also justify immediate relief from fees when relief is first sought. Perhaps the answer could be that the "tolling" technique preserves the economically beneficial screening effect of the fee. See note 110 *supra*. But this technique does so at the sacrifice of the rather different screening effects of the limitations statutes, which—in the economic perspective we are bound to suppose—were intended to have equally important, cost-saving objectives. How can the court decide which cost-saving program—access-fee screening or limitations-period screening—takes precedence? *That* problem could be avoided by sternly insisting on both screening processes and granting neither relief from fees at the outset nor tolling of the limitations period. But if the court adopts that move, it will contradict the *Boddie-Kras-Ortwein* thesis (as refined herein) that access fees may *not* be applied so as to exclude litigants from court when they have no other way of avoiding a legally final, adverse determination of their claims. At the expiration of the limitations period, the fee-frustrated potential plaintiff is visited with "finality" no less final than that which visits a defendant upon expiration of the time allowed for appeal from an adverse judgment.

The conundrum discussed in this footnote hints at a truth I shall harp on below—that the Supreme Court's firm support for the (procedural) due process claims of defendants cannot be harmonized with a strict economic approach either to due process claims in general or to those of plaintiffs in particular. See text accompanying notes 121-27 *infra*.

postures of the parties—the question of who finds himself in the position of having to take the matter to court in order to bring it to a head, and the question of who is in the position of having to appear and defend in order to have any hope of avoiding a legally final, adverse determination—seems very likely to be a result of factors, whether tactics or mere happenstance, which are quite irrelevant to any of the types of values possibly governing the access-fee relief question. On principle, the accident of respective litigating postures cannot carry the burden of determining whether an indigent person will be allowed to have his day in court at the time when he is moved to seek it.[112]

Consider the fact situation disclosed in case *A* in the story told earlier, together with a possible variation in which petitioner *A* physically repulses the company's agent efforts to take away the car. Can it really be that *A* is guaranteed an expeditious judicial hearing on the question of title *if* he has won the physical contest but *not if* he has lost it?[113] Or imagine a landlord-tenant dispute in which the tenant refuses to pay rent which the landlord says is due, and the landlord refuses to make repairs which the tenant says are promised in the lease or required by implied warranty. If the landlord reacts by suing for eviction or rent arrears and the tenant uses the repair claim defensively (say, on a theory of dependent covenants), the tenant is apparently immunized from court fees. But if the landlord instead happens upon the tactic of cutting off the tenant's heat or of taking possession of the tenant's chattels under color of a landlord's lien, the tenant will automatically "lose" if he is unable to afford whatever fees are charged as a condition of his access to court.[114]

My conclusion from the foregoing discussion can be summarized this way: whether the monopoly notion be taken as referring to technical or practical preclusion or both, whether it be taken as referring to affirmative relief or avoidance of finality or both, there is no possible

112. Professor LaFrance may somewhat overstate the point in asserting that all plaintiffs "have . . . been imposed upon; vis-a-vis the wrong and the wrongdoer, they are defendants, seeking to enforce a counterclaim." LaFrance, *supra* note 15, at 536. But he seems quite correct in adding that the "roles of plaintiff and defendant are often functionally indistinguishable." *Id.*

113. By an expeditious hearing, I mean a hearing as soon as there is occasion for *A* to want one (within whatever constraints are imposed by litigation backlogs and queues): if he lost the physical contest, the taking of the car would be that occasion, whereas if he won the contest, his being sued by the company would be that occasion.

114. *See* Willging, *supra* note 75, at 287. It will be of interest in Part II that landlord self-help under a landlord's lien is arguably a violation of due process. *See, e.g.*, Landers & Clark, Sniadach, Fuentes *and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 384-85 (1973). I assume here, as I shall assume there, that this due process challenge will fail.

statement using that notion which both describes and justifies on principle the doctrine that all civil defendants, but not civil plaintiffs generally, are entitled to relief from exclusionary court access fees. I have not rigorously proved this thesis, but I believe I have said enough to make it persuasive.

2. Of Primary and Secondary Rights, Preventive and Compensatory Relief, Active and Passive State Roles, and Rightless Plaintiffs

Without a doubt, the "economic" interpretation of legal rules, claims, and liabilities (corresponding roughly with what I have been calling the "deterrence" perspective) is, though controversial, intellectually respectable. It might seem, then, that a state could choose to organize its legal system in accordance with the economic approach without running afoul of the fourteenth amendment due process clause. The utility of modest fees for the general run of would-be plaintiffs—not excepting functionally indigent would-be plaintiffs for whom the fees would be exclusionary—is easily rationalized within the economic approach.[115] If it turned out that the same could not be said of divorce plaintiffs and of defendants generally—if there were some reason why rationing *their* judicial services by price is exceptionally dysfunctional—the fee decisions would stand explained.

Let us glance for a moment at what may be called a "pure dedeterrence" theory of law. Devotees of such a theory would have no use for any notion of particular rights as ethical imperatives and would assiduously avoid ever relying on such a notion in legal reasoning or institution building. Legal rules of entitlement and liability would be seen as having the sole purpose of directing conduct away from socially undesired and into socially desired channels.[116] (Theorists of the deterrence school, concerned as they tend to be with obviating reliance on controversial moral views, would characteristically define social desirability in standard utilitarian terms of maximizing fulfillment of individual preferences, whatever they are.) If individuals are sometimes permitted to recover specific or monetary relief in lawsuits, that would be regarded as but a device for motivating those thought best situated for detecting and proving violations of some of the rules to act as policemen and prosecutors for those violations.[117]

Under such a pure version of deterrence theory, there would be no

115. See note 110 *supra* & text accompanying notes 118-20 *infra.*

116. For a necessary refinement, see note 73 *supra.*

117. *See, e.g.,* POSNER 78, 321.

basis for preferring the court access rights of defendants to those of plaintiffs. Where monetary relief is sought, the immediate outcome of the lawsuit will be to determine whether a sum of money is to change hands. Since it plainly would be absurd to suppose, as a general rule, that money tends to generate more welfare in the hands of defendants than in the hands of plaintiffs, welfare-maximization through distribution or transfer policy cannot dictate a preference for either defendants or plaintiffs. (Similar reasoning holds where specific relief is sought: we cannot, without doing a cost-benefit analysis of the particular case, say whether welfare output will be maximized by awarding to one party or the other the particular "entitlement" in controversy.) Nor can any such preference be inferred from rule-based resource-allocation (deterrence) policy. If an indigent plaintiff with a valid claim is denied access by an exclusionary fee, a bit of deterrence potential will have been dissipated (or, as deterrence theorists sometimes say, "externalized").[118] Precisely the same is true if an indigent defendant with a valid defense is priced out of court appearance and forced into a default.[119] Whether the resulting dissipation of deterrence pressure is worth the saving of court resources (which the fees may be thought also to effect) from being wasted on frivolous claims and defenses is a strictly prudential judgment, not involving anyone's rights (since the litigants are merely instruments of society's optimizing machine); and this judgment is not at all likely to differ according to whether the excluded prosecutor-litigant is in the litigating posture of plaintiff or defendant.[120]

From this simple analysis a most significant conclusion follows: by its insistence on an absolute right of court access for defendants, the Supreme Court has evidently located in the due process clause the view that there is more to life and the legal order than economic maximizing. Defendants, at least, may not be regarded as mere soldiers in the state's prosecutorial phalanx. They must be treated as the holders of individual rights.

Interestingly, there seems to be nothing in this view of the fourteenth amendment to rouse the concern of the contemporary Ameri-

118. *See* G. CALABRESI, *supra* note 73, at 144.

119. See note 87 *supra.*

120. See text accompanying notes 113-14 *supra.*

Conceivably, the optimal arrangement would be one which sought to preserve the deterrence potential embodied in indigent claimants and defendants (by excusing them from fees), while providing some administrative substitute for the screening function ordinarily performed by fees. Whether this plan *is* the optimal scheme depends on the combined administrative costs of (1) identifying the indigent and (2) effectively screening their claims and defenses.

can school of economic analysts of law. It probably is a mistake—and it clearly would be gratuitous—to ascribe to those analysts such single-mindedness as the pure deterrence theory embodies. Their general outlook can accommodate an elementary notion of rights; for *liberty* —the realization of individual preference—can be introduced as a prime value in deterrence schemes with little if any disturbance to claims of moral "neutrality."[121] In what we can call the ethical-deterrence theory of law, to distinguish it from the pure deterrence view, each person has a *right* to have his liberty unmolested except insofar as interference is justified by a goal of economic optimization or "coordination."[122] There may be a true ethical imperative behind this right; it may be seen as standing outside of and antecedent to the deterrence scheme. Unjustified—which is to say economically or in-

121. Though the premise that the only ethical imperative consists of maximizing realization of individual preference is itself controversial, and in that sense not "neutral," that premise is already implicit in the pure-deterrence approach. *See* Heymann, *The Problem of Coordination: Bargaining and Rules*, 86 HARV. L. REV. 797, 801-02 (1973).

122. It should be noted that the question of "justification" can become rather subtle. In accident contexts governed by negligence doctrine, "innocent" (non-negligent, cost-justified) injurers are protected against liability. The opposite is true in accident contexts governed by strict liability, in land-trespass contexts, and in breach of contract contexts. In all those latter instances, liability is imposed on the injurer even when his action was the cost-justified, the economically maximizing choice under the circumstances. Why is it "justifiable" to encroach on the liberty of the latter cost-justified injurers (by making them compensate their victims), but not on that of the cost-justified injurer in a negligence context? Or, conversely, why is it justifiable for cost-justified injurers to encroach on their victims' liberty in negligence contexts, but not in strict liability, trespass, or breach of contract contexts? In each case, an answer is available which rests on economic optimization. Trespassers and contract breakers are held liable despite any optimizing effects immediately flowing from their actions, because if trespassers and contract-breakers are allowed to escape liability on a plea of cost-justification, people will be deterred from investing in land or entering into and relying on contracts. And those effects will be economically detrimental in the long run. It can be argued, then, that trespassing and contract-breaking are *never* cost-justified unless accompanied by payment of compensation to the victim. Thus the victim of these acts *who has not been compensated* has been unjustifiably imposed upon, and there is justification for imposing liability on those authors of such acts who have refused to pay compensation. But this reasoning has no application to cost-justified accidental injuries under negligence doctrine. *See* POSNER 98-99. The argument respecting strict liability is related. If a class of activities has been submitted to a strict liability regime, the reason (in the economic view) must be that imposing the costs of this activity's "unavoidable" accidents on injurers seems to promise more accident-cost savings over the long run than imposing those costs on victims. *See* Posner, *Strict Liability, supra* note 87; Posner, *A Theory of Negligence*, 1 J. LEGAL STUDIES 29 (1972). Hence the justification for encroaching on the injurer's liberty by holding him liable. And since strict liability thus commits us to the view that allowing injurers to escape liability for accident costs is an avoidable invitation to economic waste, it again follows that an uncompensated victim has been unjustifiably imposed on.

stitutionally[123] unnecessary—incursions on liberty may be disfavored intrinsically, and not merely because they tend to be wasteful of society's economic potential.[124]

At least some such elemental notion of rights, I say, must inhere in the Court's reading of due process as an absolute guar-

123. "Institutionally" necessary incursions are a subcategory of "economically" necessary ones. In the deterrence perspective, not all liability rules are imposed because the conduct they name is believed economically undesirable. Some are imposed because the transactional structure which they alone make possible is believed economically desirable. *See, e.g.*, Heymann, *supra* note 121, at 834-43; Michelman, *supra* note 83, at 663-64.

124. *Cf.* Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUDIES 13, 28 (1972): "If courts are to ignore wealth, religion, or family in deciding [tort cases] . . . then, as a normative proposition, it is difficult to suggest any criterion for deciding liability other than placing it on the party able to avoid the costly interaction most easily." The ethical-deterrence attitude may be implicit in the legal order's apparent general preference for a "negligence" as opposed to a "strict liability" approach as normally appropriate for accident law. This apparent preference is not explained by Professor Posner's meticulous and cogent argument that in most accident contexts there is no basis for regarding either approach as superior from a deterrence point of view, in the absence of empirical data not now available and perhaps unobtainable. It might seem that the preference could nonetheless be explained in strictly economic terms, as a means for avoiding where possible the administrative costs of shifting liabilities from victims to injurers—inasmuch as such costs would be incurred in a larger number of cases under strict liability than under negligence. But on a *per-case* basis the administrative costs of shifting might well be lower under strict liability; and, absent reliable and relevant data, there is no way of knowing whether total shifting costs are least under the negligence system of possibly fewer, administratively more expensive cases or under the strict liability system of possibly more numerous, administratively cheaper cases. It remains possible to explain the apparent bias in favor of negligence as a reflection of a base-line ethical commitment to liberty: when everything else is in equipoise (or unknown), the state should not bestir itself to prevent an agent from doing what he prefers, or even to make him pay for doing it. All of these points, except perhaps the last, are made or suggested by Posner's work itself. *See* POSNER 92-95, 342-43; Posner, *Strict Liability, supra* note 87, at 209, 211-12, 215-17, 220; Posner, *Negligence, supra* note 122, at 32, 33, 41-42.

One commentator, asserting that "the first task of the law of torts is to define the boundaries of individual liberty" (an assertion in which I do not find any necessary contradiction of Posner's position), goes on to argue for the proposition that "the liberty of one person ends when he causes harm to another," meaning by this that injurers (actors) should always be liable to victims (recipients). Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUDIES 151, 203-04 (1973). In Posner's version, the analyst should ask this question: Why is it not equally true that one person's boundaries, defining what counts as a harm to that person, end when insistence on those boundaries would restrict the liberty of another? Why the bias in favor of victims? *See* Posner, *Strict Liability, supra* note 87, at 215-16. If the bias is rejected, and the suggestion of ethical reciprocity between injurers and victims accepted (whether one ought to accept it need not be decided right here—Epstein's point is that one ought not), then liberties and boundaries coalesce into indistinguishable entities; and economic justification may well be allowed the ethical function of determining whose liberties/boundaries would be violated—the injurer's were he held liable or the victim's were he denied compensation. *Compare* POSNER 99-100.

anty of defendants' access. To be sure, that conclusion is not logically compelled: due process could be seen as itself a kind of economic higher law, reflecting the Framers' conviction that in the long run a requirement that defendants be heard is the socially efficient solution.[125] But it is at least a little odd to think of the Constitution as having been designed to override the *economic* judgments of sitting legislatures.[126] More immediately to the point, under such a pure economic interpretation of procedural due process, it is not apparent why efficiency does not similarly dictate a requirement that plaintiffs be heard.[127]

At first glance it might seem that the rights-centered variant of the deterrence perspective also lacks differentiating power. An alleged injurer's right not to be molested by a judgment or decree unless the plaintiff has a valid (deterrence-inspired) cause of action seems to be mirrored by a victim's right not to have been molested by the injurer's conduct unless the injurer has a valid (deterrence-inspired) defense.[128] We can see how the injurer's right argues for guarantying every defendant a hearing. But the parallel argument for victims is less sure, at least where the relief sought is a compensatory money judgment, for plaintiffs and defendants do not occupy symmetrical positions with respect to the monetary relief which may result from a lawsuit.

A lawsuit places the defendant's liberty in direct and immediate jeopardy. An erroneous, adverse judgment (including a fee-induced default judgment undeserved on the merits) will itself constitute a molestation violating the defendant's rightful liberty. The plaintiff's situation is less clear-cut. A correct judgment in his favor will, no doubt, establish that his rightful liberty—mirroring and corresponding to that liberty of a defendant which every lawsuit jeopardizes—had previously been directly and immediately violated by the defendant's conduct. Thus, an "erroneous" refusal to grant that judgment (including a refusal based on the plaintiff's fee-induced "default" in filing

125. *See* POSNER 334.

126. *But see id.* at 266-67.

127. The danger that plaintiffs will waste resources by asserting frivolous or extortionate claims seems not greatly different from the danger that defendants will waste resources by setting up frivolous or extortionate defenses. And just as the system of pretrial motions (for judgment on the pleadings or summary judgment) seems designed to limit the latter danger, so does a parallel system of pretrial motions (to dismiss) seem designed to limit the former. The frivolous-litigation problem will be further discussed in Part II.

128. This is most obvious where the victim has suffered an intentional, physical violation of his person or possessions, analogous to what the defendant will sustain in the event of execution of a judgment against him. But the principle has, I believe, broader applications. See text accompanying notes 191-98 *infra*.

suit) will deny him a factually warranted determination of prior violation of his rights. But perhaps the plaintiff does not have a right to that retrospective determination in as compelling a sense as the defendant now has an anticipatory right not to be unjustifiably molested. Could the Supreme Court possibly be influenced by any such thought in favoring the hearing rights of defendants over those of plaintiffs? (Of course, it will not work for plaintiffs seeking preventive relief. But what about money-damage actions?)

One earnestly hopes not. Such a cavalier attitude towards claims for compensation would be highly controversial in our jurisprudential tradition.[129] In that tradition there is an important strain which would find ethically opprobrious any molestation of a civil defendant for the sake of social-welfare objectives or of any other objectives, save satisfying the right of the plaintiff to be compensated.[130] In a radically different perspective, economic theorists themselves express bafflement at the notion that compensation is not simply a restoration of property or liberty wrongfully taken. [131]

There is at least one powerful, traditional tendency, in which the Supreme Court has participated, which rather strongly intimates a view that compensatory relief occupies no less high a plane of ethical importance than the primary right whose violation demands requital. Courts have frequently allowed plaintiffs bringing private actions to recover damages for injuries caused by violations of prohibitory statutes, even though the legislative authors have made no provision for private recovery, but only for penal or preventive enforcement at the behest of public authorities. Such "implications" of compensatory private rights have arisen in regard to an impressive variety of stat-

129. *See* T. SIDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 28, 31 (1847) (no legal right without a remedy); *id.* ch. II (nominal damages). "[T]he primary right to a satisfaction for injuries is given by the law of nature, and the suit is only the means of ascertaining and recovering that satisfaction . . . ." 2 W. BLACKSTONE, COMMENTARIES *438. "[T]he injured party has unquestionably a vague and indeterminate right to some damages or other, the instant he receives the injury; and the verdict of the jurors, and the judgment of the court thereupon, do not in this case so properly vest a *new* title in him, as fix and ascertain the *old* one; they do not *give*, but *define*, the right." *Id.* *See also* J. RAWLS, *supra* note 80, at 240 (relationship between availability of remedies and "stability of social cooperation").

130. *Cf.* I. KANT, *supra* note 88, at 36-37, 65, 77.

131. Indeed, the economic approach has a particular tendency to view the remedial (compensatory) claim as often itself the primary "right." Often what one has is *not* a "right" that others shall refrain from doing x (implying a claim to preventive relief), but rather a "right" to be compensated for injuries caused by anyone doing x. This will be the case whenever recognition of a preventive right (or "property right," *cf.* Calabresi & Melamed, *supra* note 84, at 1092) would be economically unsound because it occasions excessive transaction costs. *See* POSNER 276, 320.

utory prohibitions, including securities-regulation laws[132] and zoning laws.[133]

One can attempt to explain this phenomenon strictly within the deterrence vision of the legal order, but the results are not compelling. Where the only sanction provided by statute is a penal one, the most inviting economic account would be that while damage recoveries are designed to serve the basic deterrent function, the total volume of deterrence they generate has been deemed inadequate—possibly because not everyone harmed by the restricted line of activity is either motivated to sue or able to sue successfully.[134] Supposedly, the criminal penalties are meant to fill the resulting deterrence gap. A critical weakness in this account is its supposition that the legislature has calibrated the penalties in the manner described—a seemingly baseless assumption where the legislature has not openly adverted to the possibility of civil actions. The account, in short, is circular: it justifies the inference of civil liability by imaginings about how the legislature might have gone about its job of calibrating penalties *if* the legislature had intended civil liability. Another deterrence theorist might momentarily slip his moorings and argue that by flatly prohibiting a line of conduct and making it criminal, the legislature expressed its purpose of stopping the activity cold. Since some violations inevitably slip through the net of penal law enforcement, he would add, it is plainly consistent with the legislative design to employ civil actions as a backstop. But his colleagues would quickly point out that you have to take the legislature seriously and that when it sets up a deterrence system whose actual effect is to cut back on a line of activity to a degree short of totality, the legislature presumably regards just that degree of reduction as socially optimal.[135]

132. *See* J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

133. *See* Schwartz, *The Logic of Home Rule and the Private Law Exception,* 20 U.C.L.A.L. REV. 671, 706-07, 709 (1973).

134. *See* POSNER 68, 358, where Professor Posner suggests another reason why civil damage liability might provide inadequate deterrence: Why is theft made criminal? After-the-fact external evaluations by judges and juries are less accurate than the parties' own evaluations as reflected in a voluntary transaction between them. Therefore, in regard to all situations in which voluntary transactions are feasible without excessive transaction costs, societal savings might be effected by preventing unilateral substitution of the less accurate adjudicatory evaluation for the more accurate market evaluation.

135. *Cf.* POSNER, 358-59, 365-67. Of course, in some of these contexts (but by no means all), the most plausible inference will be that although the legislature would have wanted total elimination if elimination (law enforcement) were costless (see note 134 *supra*), the lawmakers have concluded that after a point the marginal costs of enforcement exceed the marginal savings thereby effected. In those situations, it might seem that additional deterrence through civil actions can only be welcome. But what

For a like reason, the deterrence theorist will have difficulty explaining the implication of a civil damage recovery where the legislature has provided only for preventive sanctions under the control of public officers. Preventive sanctions may seem to imply, more clearly than penal ones, a legislative purpose of dead-stopping the target activity. But law enforcement budgets are also a legislative output, and administrative officials are accountable to the legislature. If, therefore, budgetary constraints and administrative policy lead to selective or incomplete prevention, that outcome must be ascribed to the legislature.[136]

Then what are we to make of a court's insistence on throwing the legislature's preferred balance of incentives out of whack (for aught the court can tell) by "implying" civil damage recoveries? Does it not seem that the court (and through the court, the legal order) is exhibiting more concern about rights—specifically, rights to be compensated—than about incentives? Does it not seem as though the court's premise is that one just has a right to be compensated when his boundaries (however the legislature chooses to define them) are crossed?[137] And that this notion of right, in fact, is so deep-seated as to override the undoubted societal goal of economic maximization?[138]

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about the costs of *those* actions (which of course are social as well as private)? Since the legislature has forborne to provide for private actions, what justifies the inference that it thought their costs worth incurring? An economic analyst might say the worth of such costs is demonstrated by the very willingness of people to shoulder them privately. But this view seems incorrect since a significant share of litigation costs is borne by the taxpaying public, presumably because deterrence and effectuation are recognized as partially public goods. *See* Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 670-71 (1973); POSNER 322-23.

136. For a discussion that serves to complete the argument, see note 135 *supra*. The argument tends to contradict Professor Schwartz's apparent view that allowing private injunction suits for statutory violations implies no private right but only enlistment of the private suitor in the public's deterrence program. *See* Schwartz, *supra* note 133, at 706 n.181. Allowance of such suits tends to upset the kinds of legislative balances discussed in the text and, in that light, reflects a notion of private rights irrespective of imputed deterrence programs.

137. *Cf.* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

138. Compare the concept of "rights" offered by another writer: "I shall say that an individual has a *right* to a particular political act [*e.g.*, to be awarded damages], within a political theory, if the failure to provide the act, when he calls for it, would be unjustified within that theory even if the goals of the theory [*e.g.*, economic optimization] would, on the balance, be disserved by that act." Dworkin, *supra* note 88, at 520.

The text's suggested account of private damage recoveries for statutory violations seems especially compelling when the violated enactment is a municipal ordinance. There exists a traditional reluctance to believe that it is appropriate for municipal gov-

When all is said and done, there seems to be no license either in the Constitution or in any established jurisprudential tradition for regarding specific, preventive relief (that which a defendant always requires) as more important than monetary, compensatory relief (that which plaintiffs often require)—"more important," that is, in the sense that an erroneous withholding of specific relief is the worse or more regrettable sort of event.

There yet remains one reason which might be given for preferring defendants' access rights to those of plaintiffs—even, indeed, of plaintiffs seeking preventive relief. Is there not a difference between the two situations with respect to the quality of the state's contribution to the risk of violation of the would-be litigant's rights? Should an erroneous judgment be enforced against a defaulting defendant, the state itself will have committed an unjustified molestation. Is that not a worse, a more pernicious, type of behavior on its part than merely failing to come to the aid of a plaintiff whose rights are being (or have been) violated by someone else?

Well, *why* is it worse? Why should we feel worse about it? (We are not, be it noted, confronted here with any technical "state action" problem; for the state's insistence on its access fees will amply bring the excluded plaintiff's grievance within the "No state shall . . ." phraseology of the fourteenth amendment.)[139] But is it not possible that, without being able precisely to say why one should feel worse about the state's actively risking a violation of rights than about its passively risking failure to correct a violation committed by another, defenders of the Court's defendant/plaintiff line could nevertheless connect that line with a deep-seated instinct in our legal and ethical tradition—that which looks more searchingly at active than at passive behavior?[140] Here at last we meet a ground of distinction which can claim a degree of resonance with a pervasive tenet of the legal tradition.

But this ground, too, gives way upon close inspection. Its weakness is not in the claim of an entrenched tendency to distinguish between active and passive behavior and treat the former as more liabil-

erning bodies to define people's rights, although these bodies are to varying degrees authorized to regulate in the interests of deterrence or resource allocation. *See generally* Schwartz, *supra* note 133. Yet when municipalities engage in deterrent regulation, courts (insofar as they allow reliance on these regulations in civil damage actions) insist they have ipso facto wrought a redefinition of rights. *Compare id.* at 706.

139. This matter is further discussed in Part II.

140. *See, e.g.*, Epstein, *supra* note 124, at 189-204 (discussion of "Good Samaritans").

ity-prone (for I readily concede the truth of that claim), but in the assumption that the state's treatment of the excluded plaintiff is appropriately classed as passive. For, as I shall explain, there is an important and traditional jurisprudential perspective in which the state must be regarded as interfering actively with the rights of the would-be plaintiff from whom it withholds relief without a hearing; and, just as in the case of the comparison between specific and compensatory relief, the Court has no detectable license (nor has it even begun to suggest any reason) for rejecting this view.

The traditional perspective I have in mind is the "natural right," "social contract" view which regards litigation as a state-imposed substitute for the troublesome right of self-help which would prevail in the state of nature.[141] For clarity's sake, assume that the excluded plaintiff has a legally valid cause of action—that if given a judicial hearing, he would be held entitled to relief.[142] It follows that he is a person whose rightful liberty, as the state itself has seen fit to define that liberty, has been violated.[143] Still for the sake of clarity, assume that the violated interest is one universally protected by law throughout the Western world: the defendant, let us suppose, is intentionally and repeatedly vandalizing the plaintiff's home. For a final simplifying assumption, we can imagine that the plaintiff is seeking preventive relief which would ordinarily be available under the circumstances described.[144]

Any similarly situated victim able to pay court access fees would obtain the desired relief. It would be naturally and commonly said that his recovery reflects a *right* on his part not to be molested in the manner described and (or including) a right to relief against the molestation. The Supreme Court's *Boddie* dicta regarding defendants imply, as we have seen, an ability to appreciate this view, inasmuch as our plaintiff's right (or rights) must be seen as mirroring those which defendants assert when insisting on protection against the entry of erroneous judgments against them.[145]

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141. For a searching exploration of this view, see R. NOZICK, *supra* note 91, ch. 5.

142. This merely parallels the simplifying assumption which must be made for a defendant in order to appreciate that his rightful liberty is at stake when he is sued. In subsequent discussion I shall revert to the more accurate locutions of risk and probability. See text accompanying notes 149-50 *infra.*

143. I reserve for later discussion the question of whether *every* recognition or definition by the state of a legal cause of action must be construed as a definition of rightful liberties. See text accompanying notes 193-98 *infra.*

144. I have already given my reasons for believing that money-damage cases cannot tenably be distinguished. See text accompanying notes 129-38 *supra.*

145. See text accompanying notes 120-27 *supra.*

Now just what would people be thinking of, or meaning, when they described the protected defendant or the recovering victim as the holder of a "right"? How can we specify the ethically imperative or normative sense in which "right" is evidently used in such a locution?

To begin with, we seem to be talking about relationships among persons in society. We do not mean a claim or expectation that God shall arrange things so that one's rightful interests will never be violated, but a claim against other persons that they shall respect those interests. But the notion of a right clearly is not the same as that of a mere *normative appeal to* others; the former idea conveys a stricter sense of personal prerogative.

Perhaps we can specify an irreducible minimum content for the common notion of a right in ethico-legal discourse by means of the following paradigm. Consider a series of statements:

1. You have a right that no one (or no one who belongs to some class) shall do x (assault you, or take away your property, or break his promise to you, or whatever).

2. You are entitled to stop a person from doing x.[146]

3. You are entitled to require the state to stop a person from doing x.

4. You are entitled to punish a person for doing x.

5. You are entitled to require the state to punish a person for doing x.

6. You are entitled to extract compensation from a person who harms you by doing x.[147]

7. You are entitled to require the state to extract compensation for you from a person who harms you by doing x.

Now statement 1, I suggest, entails the truth of at least one of the statements 2 through 7. It is quite commonly the case that statements 2, 4, 5, and 6 are false. But whenever those statements are all false, statement 1 is also false unless at least one of statements 3 and 7 is true. But the proposition that at least one of 3 and 7 is true is pre-

146. To "stop" means to take whatever measures may be actually necessary to that end. To be "entitled" to stop means both that some such measures exist which are practical as well as prudent and that you may take them without subjecting yourself to punishment or civil liability. I say that available measures must be prudent and practical in order to make clear that the entitlement is not satisfied by showing, for example, that a person could effectively prevent others from assaulting him by adopting the lawful expedient of becoming a hermit.

147. Again, to be "entitled to extract" means that you may do whatever is necessary to obtain the compensation, and at no risk of criminal or civil liability.

cisely the proposition which entitles you to maintain a civil action leading to injunctive or compensatory relief against the doing of *x*. Such relief, then, is something the state *owes* you, as long as 1 is true and 2, 4, 5, and 6 are not. Not to give a person what is owed him is not, of course, to act "passively" in any sense in which passive behavior has ever been thought (or felt) to be legally or morally less suspect than active behavior.[148] We cannot coherently say that you have a right not to be trespassed against and that the state acts passively in refusing both to grant you relief against trespasses and to permit your resort to punitive or reparative self-help when your prudent attempts at prevention have failed. And we have no basis for denying that you have such a right, once we both have conceded that *some* persons in *some* situations *do* have rights and have observed that the state generally recognizes a cause of action to obtain relief against trespasses.[149]

Thus, reverting to the case of petitioner *A*, the civil plaintiff who had his car repossessed, in my introductory story, we realize that the state has been passive there only if *A* has suffered no violations of his rights. But that is an impossible thing to say except on the pure deterrence view that no one has any rights. And that view seems unavailable to the Supreme Court for at least three reasons: (1) the populace would find it downright weird; (2) it is extremely controversial amongst jurisprudential thinkers, past and present, who lie well within our legal tradition; and (3) the Court itself has rejected it in countless due process decisions, protecting the rights of defendants.

The seeming difference in the state's treatment of plaintiffs and defendants thus becomes obscure. A state which excludes a defendant from the litigation forum may be seen to create a severe risk that its enforcement of a default judgment against him will directly violate his rights. A state which excludes a plaintiff from the litigation forum may be seen to take just as severe a risk that its failure to aid the plaintiff directly violates his rights. Even if we say that the plaintiff's violated rights are merely "remedial," and somehow conclude that remedial rights are of inferior importance as compared with primary rights from which they are differentiated, it seems impossible to see the state as treating the excluded defendant "worse"

148. *See, e.g.*, T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 468-72 (5th ed. 1956).

149. If your right is conceived as just a right to be compensated for injuries caused by the doing of *x*, rather than as a right that *x* not be done (see note 131 *supra*), my argument is simplified but no less valid.

than the excluded plaintiff. The excluded defendant's primary rights may be violated; if so, it will be the state that violates them. The excluded plaintiff may already have had his primary rights violated. It was not the state doing that violating, but the state now risks violating his remedial rights *and thereby imposing on him the continued violation of his primary rights.* For were it not for the state's violation of his remedial rights, the victim's primary rights would now be vindicated. The state, accordingly, becomes responsible for the primary violation, too. That a wrongdoer is responsible for all the proximate consequences of the wrongful act is no less entrenched an attitude in our law than the concept that active is more suspicious than passive behavior.[150] So, while the state risks injuring the excluded defendant, in the case of the excluded plaintiff it risks not only injury, but injurious insult to boot.

C. Divorce vis-à-vis Other Claims

1. Marriage and the Rest of Life

The discussion in the last section, while designed to show that the distinction between defendants in general and plaintiffs in general is largely illusory, does at the same time shed light on the Court's urge to class together the predicaments of the *Boddie* divorce suitors and of defendants in general.

Insofar as anyone is tempted to distinguish defendants from plaintiffs on the ground that the primary rights of defendants, but not those of plaintiffs, are placed in direct jeopardy by exclusion from a litigation forum, the *Boddie* situation apparently falls on the "defendants" side of the line; for the relief sought by the petitioners there was precisely a release from existing shackles on their freedom of action.[151] Moreover, while it may be plausible to explain most civil actions as pieces of a grand deterrence design (and thus avoid any need to infer a "right" on the plaintiff's part from the fact of legal recognition of his cause of action), to think of divorce suits in that way requires strenuous mental acrobatics.[152] Accordingly, one could imagine the

150. Of course the concept of "proximity" is not free of ambiguity. But proximity is hardly in donbt in this case. The express purpose of the state's obligation is precisely to prevent or repair the violation of the victim's primary right. *Cf.* Hadley v. Baxendale, 9 Exch. 341 (1854).

151. But the criterion of immediate involvement of primary rights will not reliably distinguish *Boddie* from other cases where plaintiffs seek specific relief. Consider again the case of a person wishing to sue for injunction against poisoning of the atmosphere that blankets his residence.

152. It is easily thinkable that the legal order would wish to create "sanctions" to

Court reasoning (or feeling) that insofar as state law creates a divorce cause of action, it must thereby mean to recognize the aggrieved spouse's right, under the described circumstances, to be free of the marriage.[153] The divorce suitor would then seem to resemble the usual defendant in having at stake a right and not merely a prosecutorial function.

Finally, it may seem intuitively clearer as to excluded divorce suitors than as to other excluded plaintiffs that the state is responsible for an active violation of rights which the state itself has recognized, and not merely for a passive failure to assist in correcting violations committed by others. For the state is the author of both the rules imposing special restrictions on the freedom of married persons and the rule forbidding self-help retrieval of one's liberty from the grip of those restrictions, even when one has a right (as conceived by the state itself) to have one's liberty back.

But of course the state has likewise largely preempted the self-help opportunities of the victims of torts, breaches of contract, and breaches of trust. And this observation easily suggests a close analogy between the state's treatment of the rights of divorce suitors and those of other plaintiffs: in both instances, the state insists on injecting its own adjudicative and enforcement process into an aggrieved person's quest for vindication of his acknowledged rights, presumably because of concern about the risks of disorder and possibly about other dangers to the interests of unrepresented persons,[154] thought to accompany the use of self-help.[155]

"deter" the classes of behavior constituting the legal grounds for divorce, but it is hardly thinkable that divorce is the sanction that would be chosen. Nor can any credible economic design be discovered in the scheme of allowing legally aggrieved spouses—but not other spouses—to "set up a market transaction" (in what commodity?) by threatening exercise of the qualified right to exit from the marriage.

153. "Feeling" is probably the more accurate participle. It is always imaginable that the legislature simply determined (or, in its turn, felt) that social welfare would be maximized by allowing the aggrieved spouse to be released in the statutorily defined situations.

154. This concern about the rights of the unrepresented seems especially plausible in the context of divorce. An obvious symptom of the concern is just the feature of the divorce context that made the Supreme Court feel that divorce was "different": that is, the requirement of judicial action even where both spouses agree to divorce. See text accompanying note 27 *supra*.

155. My point—that the state's withholding of judicial assistance from victims of private wrongs is not different enough from its denial of analogous assistance to victims of "wrongful" marriages to justify the conclusion that the latter action but not the former denies due process—is distinct from, though closely related to, Professor Goodpaster's suggestion that legal proscriptions of self-help amount to "state action" sufficient to bring such withholdings of relief within reach of the fourteenth amend-

Those who persist in feeling that the divorce situation is somehow "special" have open to them one last possibility of explaining and defending that feeling—a possibility hinted at by the Court through its repeated harping on *marriage* (as distinguished from liberation from an undesired and legally vulnerable marriage) as a "fundamental interest" at stake in the *Boddie* case.[156] Perhaps *Boddie* can fruitfully be regarded as a "substantive" due process case, rather than—as we have been regarding it up to now—as a case posing a "procedural" problem about the circumstances under which an aggrieved party is entitled to a judicial hearing. Let us see what happens if we try:

One has an important interest [157] in being able to get married—in domesticating with the partner of one's choice under the blessing of the legal order. But while the state of being married is highly desirable to many, and carries important advantages, it also carries important hazards—in particular, the hazard that a marriage will "go bad" to the point where one has both a strong desire and legal right to get free of it.

One has also, then, an important interest in being able to escape from a bad marriage. Now what Connecticut had done to persons wishing to marry was this: the state had conditioned their enjoyment of their important interest in getting married upon submission to a regime in which their important interest in getting unmarried would be conditioned upon payment of a fee. That is, full enjoyment of all their important interests counected with marriage (consisting of being able to get married with assurance that you can get unmarried if the need should arise), was conditioned on prospective ability to pay a fee. A slightly different statement is that persons could not undertake enjoyment of their important marital interest free of the burden of a certain unwelcome prospect—that they might be stuck with a bad marriage, one from which release would be disallowed because the spouses could not afford the state's price for release.

Now let us consider, instead of one's interest in getting married, another interest which will generally be conceded to be important. Let us use the word "live" to signify engagement in the round of activities that adds up to one's being a productive and self-respecting participant in civil society. Like getting married, "living" is in the eyes

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ment due process clause. *See* Goodpaster, *supra* note 102, at 223, 251. I shall suggest a different approach to the state action issue in Part II.

156. Of course, the Court may simply have been thinking that you have to get unhitched before you may get hitched again.

157. I forbear from saying "fundamental" or "constitutionally protected" interest for reasons explained at length below. See text accompanying notes 162-86 *infra*.

of many a highly desirable activity; and, like getting married, it is accompanied by certain grave risks. If you are going to "live," you are going to court the risk that your boundaries will be crossed—that you will be unjustifiably molested.[158] One way of counteracting the risk of boundary-crossings is to be prepared to use self-help either to prevent a threatened crossing or to exact requital in case prevention fails. However, it is a condition imposed by the state upon the "privilege" of living that you may not normally use punitive or reparative self-help. Rather you must invoke the state's assistance by becoming a plaintiff in a lawsuit. If that assistance is conditioned on your payment of a fee, then enjoyment of your interest in living is burdened by the unwelcome prospect that your boundaries will be crossed with impunity whenever prevention by lawful means is impractical and you lack the price of vindication through law. It becomes true of living, as of marrying, that you cannot undertake to do it unburdened by the prospect that it will bring you to serious grief, namely, the defenselessness of your boundaries.

How can it be said that what the state accomplishes by the combination of prohibitions on punitive and reparative self-help plus plaintiff filing fees is worse than what the state was not permitted to do to the *Boddie* petitioners? Is the interest in marrying more important than that in living? Is the state of being (more or less) helplessly exposed to boundary-crossings less undesirable than that of being locked into a bad marriage?

2. *Constitutional and Other Rights*

Defenders of the *Boddie* line might respond that the associational interests tied up with marriage and divorce must be deemed more deserving of protection than the generality of interests tied up with living (no matter how implausible that ranking may seem to some), because the former interests occupy a special status in the constitutional document which is the Court's basic charter.

As long as the assumed access rights of civil defendants generally are kept in view, the constitutional-interest factor cannot alone explain emergent doctrine. Like technical monopoly, the constitutional-interest factor may succeed in differentiating divorce plaintiffs from plaintiffs in general, but it cannot distinguish defendants in general from plaintiffs in general.[159] Reliance on the constitutional-interest factor thus

158. The useful metaphor of the boundary is part of my debt to another writer. *See* R. NOZICK, *supra* note 91.

159. Of course, we can imagine a case in which, say, the defendant is confronted

implies some sort of functional equivalence (for purposes of saying when persons may not be denied access to court) between having such an interest at stake (if you want to be a plaintiff) and facing the threat of a legally final determination (*i.e.*, being a defendant) if you have no such interest at stake. The implication of emergent doctrine is that lack of *practical*, extrajudicial escape routes from a threat of *legally final determination* is the functional equivalent of *technical* lack of extrajudicial means of vindicating a *constitutionally favored interest.* I submit (incorporating by reference all prior discussion of the monopoly factor)[160] that there is no possible way to establish such a peculiar-seeming equivalence except simply to run it up the flagpole.

At any rate, the persuasiveness of the proffered equivalence must depend heavily on the validity of the constitutional-interest factor itself, in isolation from the monopoly or finality-threat factor, as a discriminant for court-access problems. In order to isolate the constitutional-interest factor for close examination, I want to assume *arguendo* a doctrine under which all plaintiffs suing to vindicate such interests,[161] and only such plaintiffs, enjoy constitutional protection against exclusion by court fees.

Now the view implicit in the assumed doctrine seems to be that if a legal claim can be hooked up in the required way[162] with a constitutional text bestowing some sort of personal right (or otherwise granting special recognition to some personal interest), we ought to

with an injunction against his speaking freely; but the Court's intended protection for defendants plainly is not limited to such cases. One could also note that a money judgment will cut down the defendant's ability to exercise his preferred freedoms; but, then, so will a plaintiff's inability to recover such a judgment. To suggest that defendants but not plaintiffs have a constitutional *due process* right not to be denied a hearing will not help, since that is just the proposition I am challenging. In order to cut any ice, the interest which enjoys preferred constitutional status must be one which the hearing would help protect; it cannot itself be the interest in being heard.

160. See text accompanying notes 100-15 *supra.*

161. I make this assumption irrespective of what relief is sought or of whether it is technically available through extrajudicial channels.

162. The reason for the circumlocution is that it is unclear just what form of verbal connection between the plaintiff's claimed interest (or his cause of action) aud the constitutional text is required in order to activate the *Boddie-Kras-Ortwein* preference for constitutional rights. On the one hand, we have to assume that such activation does not result simply from the plaintiff's assertion of an interest in "life, liberty, or property" protected (in certain ways) by the fifth and fourteenth amendments' due process clauses (and consider, also, the fourth amendment), else virtually all civil plaintiffs would enjoy preferred status. On the other hand, the Constitution's failure to mention an interest explicitly does not ipso facto exclude it from the preferred circle. Consider, for example, the interest in "freedom of association" involved in *Boddie.*

be more anxious to allow for vindication of that claim than to assure vindication of the residue of run-of-the-mine claims based on common law and statute. In the effectuation perspective, the implicit view would be that legal vindication of constitutionally affiliated interests is more important to the individuals holding those interests than is true of other interests protected by nonconstitutional law. A further possibility, of course, is suggested by the deterrence perspective: whether or not "constitutional" interests are more important to their holders than other legally protected interests, their vindication *is* more important from the standpoint of a society relying on privately instigated litigation as a process for curbing socially undesirable types of behavior. *A priori* there seems to be no basis for supposing that importance from the deterrence standpoint is perfectly congruent with importance from the effectuation standpoint. Accordingly, in the discussion which follows, I shall mean by "importance" of an interest the relative urgency or priority from either standpoint (whichever may be preferred by the reader wishing to attack my argument) of litigation seeking to vindicate that interest.

As examples of constitutional interests, we can use freedom of speech and the freedom of association involved in *Boddie*.[163] For present purposes we can speak of interests in freedom of speech and association without saying precisely what categories of possible activity would be thought to implicate these interests to a significant or critical degree. We need assume only that there are discoverable sets of such categories,[164] such that interference with one's liberty or ability to engage in any of the activities those categories contain is thought to violate[165] freedom of speech or association. We shall call these activities "constitutionally protected."

Examples of interests protected by law but not, as such, by the Constitution,[166] are the interests in physical security of person or possessions, in one's deservedly good reputation, in not being defrauded,

163. Readers might find it illuminating also to bear in mind the constitutional interest involved in my story (see text accompanying notes 4-15 *supra*): that is, the interest in not being deprived of one's possessions by the state without having been afforded a hearing. For present purposes it does not matter that association is not mentioned *eo nomine* in the Constitution. For simplicity, we can imagine that it is.

164. However, these categories may not be discoverable except by a casuistic process of case-by-case examination.

165. For the sake of textual simplicity, I shall use "violate," in regard to a constitutionally protected interest, to describe actions which are either held to be prohibited or held to require extraordinary justification (*e.g.*, a "compelling state interest").

166. The reader must remember that "life, liberty, and property" *simpliciter* do not count as constitutional interests. See note 162 *supra*.

in not having one's living space made unhealthful.[167]

However superficially appealing the inference that constitutionally recognized interests are more important than other legally recognized interests, that inference cannot validly be drawn unless it noticeably harmonizes with what we know or can plausibly believe about why some interests are mentioned in, or read into, the Constitution and why some are not. Is it the case that associational freedom was mentioned (as it were) and personal security was not because the Framers thought, or the courts think, that the former interest is more important than the latter? Do we think that? Is it not a most implausible view?[168] But then what can account for the Constitution's selective enshrinement of interests?

One must begin by noting that the Constitution, insofar as we view it as designed to protect interests,[169] is specifically concerned with preventing their violation by government and its agents. The Constitution does not purport to regulate private conduct. Out of that circumstance arises a basic ambiguity as to what is meant by my assumed doctrine that an indigent plaintiff is constitutionally entitled to relief from access fees if, but only if, he is seeking to vindicate a constitutional interest. For a person's interest in, say, freedom of association is obviously susceptible of violation by both private and governmental conduct, although private violation is not covered by the constitutional prohibition. In the case of private violation, are we to say that a constitutional interest is involved so that exclusionary access fees may not be imposed? If the answer is "no," we shall have to explain why preventing or requiting violations of, say, the associational interest is more important when those violations are committed by governmental than by private agents. If, on the other hand, the answer is "yes," we shall have to display and test the reasoning that connects the premise (that certain interests have been accorded special protection against *governmental* encroachment) with the conclusion (that it is more important to litigate against *private* violations of *those* interests than private violations of *other* interests). If neither of those

167. It is a natural temptation to include the interest in having your promises kept. But it not quite clear why *that* interest is not a constitutionally protected one. *Compare* U.S. CONST. art. I, § 10 *with id.* amend. I. *See also* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 939 & n.107 (1973); Tribe, *Forword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 12 (1973). On the other hand, it seems too much to accept that the "contract" interest is more important than the personal-security interest.

168. How can the associational interest be realized if the security interest is not?

169. For a different, though related perspective on the "substantive" provisions of the Constitution, see Tribe, *supra* note 167.

tasks can be satisfyingly done, the only conclusion left will be that constitutional enshrinement of an interest is not a measure of the importance of litigation seeking to vindicate it; and then the task will be to explain, in some way which harmonizes with that conclusion, the phenomenon of selective constitutional protection.

Let us now consider the application of constitutional limitations to government in contexts not directly involving its distinguishing monopoly over lawful force and legislative authority—where government acts as an owner, rather than purely as a sovereign, in controlling access to and enjoyment of benefits such as employment, largess, or public facilities.[170] Public facilities are the most interesting case for our purposes because they pose the clearest comparison between governmental and private interference with protected activities. The Constitution prohibits[171] government from squelching speech on its land, but private landowners are generally free to squelch.[172] Does this differential treatment signify a judgment that governmental squelching is "worse" than private squelching—or that vindication of the interest in freedom from governmental censorship is more important than in the case of private censorship? If pressed to explain or justify such a judgment one might refer to special symbolic or anti-educative elements in governmental censorship, or to the special likelihood that government will control an unusually large portion of the places where people will want to speak out. But these explanations have weaknesses,[173] and their significance may pale in the light cast by another: that governmental censorship can be proscribed with compara-

170. I do not mean that a discriminatory or censorious type of public-property management may not originate in statute; but such a statute would not be an exercise of "legislative" power within the classification which is convenient for my present purposes, because we can as plausibly see the government in such cases acting in the capacity of owner as in that of lawgiver.

Government also controls access to activities having no private-sector analogues—the vote, for example. This suggests another reason, not discussed in the text, why certain constitutional mandates are addressed to government agents only: such mandates would be irrelevant if addressed to anyone else. Guaranties concerning the franchise and the litigation process (*e.g.*, jury trial, confrontation, right to counsel) are the obvious examples. *But cf., e.g.*, Terry v. Adams, 345 U.S. 461 (1953); Screws v. United States, 325 U.S. 91 (1945).

171. I use this term to encompass also the notion of demanding a special justification (compelling state interest). See note 165 *supra.*

172. *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

173. *Symbolism*: Why is governmental tolerance of squelching by major landowners less deplorably symbolic than squelching by the government itself? *Compare* Reitman v. Mulkey, 387 U.S. 369 (1967). *Government as major landowner:* Is it likely that the historical framers wished or contemplated that this development would come about? Is this condition endemic in the constitutional scheme?

tive abandon because when it occurs there are no competing values of privacy, territoriality, or individual autonomy to weigh in the balance.[174] Framers envisioning an individualist, open society, served by both an economic market and a lively marketplace of ideas, would want to rule out state censorship but would have to shrink from banning censorship by private owners. These framers would probably leave to the legislature the task of striking the appropriate balance from time to time between the needs or values of speech and those of privacy and ownership.[175] But persons in their roles as governmental agents neither enjoy nor represent that complex of values traditionally ascribed to institutions of private ownership; and given a modicum of special reason to mistrust their commitment (and that of the legislature) to free speech values,[176] framers could well prefer a limited sacrifice of future legislative flexibility in return for enlistment of the judiciary in the resistance to state censorship.

Enough has been said, I believe, to show how shaky must be any inference that litigating in opposition to censorship is more important when the state is the censor than when it is not. Indeed, the opposite inference is at least as plausible. The question of litigating in opposition to private censorship can arise only when the rules of statutory and common law are such that one can successfully plead a cause of action against a private owner, with the claim stemming from the latter's acts of censorship on his own turf. And when that is so, it seems that the lawmakers and law-declarers—legislatures and courts—have placed an unusually high value on the individual or social interest in the expressive activity. They have concluded that that activity, under the circumstances surrounding it, has sufficient importance to overcome the competing values associated with privacy and ownership—the very values whose ubiquitous importance may explain why the Framers withheld constitutional prohibitions against private interference with speech.

I conclude that, in the case of the free speech interest, there is

174. *Cf.* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003, 1011, 1016-18, 1045 (1973).

175. *See, e.g.*, NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) (construing National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1970)); Ch. 93, [1973] Minn. Laws. In Lenrich Associates v. Heyda, 504 P.2d 112 (Ore. 1972), the court read Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), as holding that the private-property interests were constitutionally preferred to the speech interests, so that a state law requiring owners to make allowance for speakers would be invalid. For effective criticism of this amazing decision, see 86 HARV. L. REV. 1592 (1973).

176. See text accompanying notes 183-84 *infra*.

nothing like a firm basis for inferring that litigation is more important when directed against governmental than against private violations. If no such basis exists in the case of speeeh, it seems most unlikely that any will be discovered for many—if any—of the other constitutional interests. The relevance to the access-fee problem of constitutional enshrinement of the interest at stake must, then, be as great when the alleged violator is a private citizen as when he is a state agent. But thus broadly construed, perhaps the relevance of selective enshrinement is, at least, plausible. For what can the principle of selection be, if not judgments of relative importance of the protected activities? If relative importance is what determines the selection of interests for special protection against *governmental* violation, does it not make sense to think that a parallel ranking of interests implicitly holds when violators are private—even though *their* violations are not constitutionally proscribed?

To see what is wrong with such reasoning, we should now consider the application of constitutional limitations to government in its "sovereign" capacity of law-giver and monopolist of lawful force. Government is distinguished by its exclusive control of the power to say whether a given course of conduct will or will not give rise to liability to some form of coercive redress; and this distinguishing power of the government to make the law seemingly must be a major factor in explaining why certain prohibitions are written so as to apply specially to government (a truth made manifest by the very language of some familiar constitutional prohibitions).[177]

Consider again a person's interest in freedom of speech or association, and compare the private and governmental sectors with regard to their respective abilities to violate the interest. Absent constitutional limitations, government can fashion the law so that a person will be punished for engaging in protected activities, or so that others will be punished if they so conduct themselves as to facilitate or accommodate engagement in protected activities, or so that governmental agents will be immunized from legal liability in case they interfere directly with one's engagement in protected activities or with the facilitating or accommodating actions of others. On the other hand, a private agent (except insofar as he acts in an ownership capacity) almost certainly cannot undertake to produce comparable results without committing a tort. Nontortious violation of one's interest in freedom of association will not normally occur except through an exercise of lawmaking power that belongs exclusively to government.

177. See note 167 *supra*.

Now let us attempt a parallel discussion concentrating on the interest in personal security. It is no less true of this interest than of association that government can exercise its lawmaking power in a manner antithetical to protection of the interest. A law might excuse from normal tort-law sanctions certain categories of private conduct that appear to violate or threaten the personal-security interest (for example, a statute authorizing the location of noxious or dangerous activities at places where they might be actionable nuisances at common law);[178] or a law might authorize punishment of one who tries to protect himself physically against such private conduct (for example, a gun-control law—not clearly considered, in spite of the second amendment, to warrant "strict" judicial review).[179] For purposes of the present discussion, we must assume that such laws are valid despite any challenges which might be launched under the due process or equal protection clauses—that the Constitution *does* prohibit laws hostile to the *associational* interest, but *does not* prohibit laws hostile to the *security* interest.[189] Does not such a comparison indicate that the former interest is deemed more important than the latter? What else can possibly explain the Constitution's selection of which interests to protect against hostile exercises of legislative power? Any disagreement we might have with the Framers' implicit ranking (for example, their preferring freedom of association to security of person and possessions) could not refute this account if it is the only plausible one. But such disagreement can and should not only prompt a search for an alternative account which does not entail such implausible rankings of interests by supposed importance, but also make us receptive to any such alternative we may discover.

Now there is available a perfectly plausible—indeed, a rather persuasive—account of selective constitutional protection for interests. Relying not at all on implausible suppositions about the interests' relative, intrinsic importance, this account rests on the ideas that judicially enforced rules limiting legislative power are generally undesirable and that it is generally best to allow the legislature to pass laws without restriction, apart from its members' own morality, prudence, and political ambition. Judicial control might be disfavored both for reasons

178. *See, e.g.*, Linsler v. Booth Undertaking Co., 120 Wash. 177, 206 P. 976 (1922) (compliance with zoning ordinance negates nuisance liability).

179. *See* United States v. Miller, 307 U.S. 174 (1939).

180. Environmental litigation is now generating holdings that preservation of a healthy environment is not a constitutional right. *E.g.*, Hagedorn v. Union Carbide Corp., 5 E.R.C. 1755 (N.D.W. Va., Aug. 24, 1973); Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972); *see* Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971).

of democratic principle[181] and because prohibitory rules suitable for judicial enforcement will tend towards a degree of generality and inflexibility that on at least some occasions will rule out legislative actions both expedient and just.[182] Given this general attitude, framers[183] might nevertheless be led by speculation or historical experience to believe that there are some exceptional categories of interests as to which neither the moral and prudential sensitivities of legislators nor the political check will function adequately as a deterrent against inexpedient or unjust laws.

To see how such interests might be selected, we can imagine scales measuring four different traits. A selected interest is one which scores relatively high on at least one of the first two scales and on both of the second two. The traits measured by the scales are: (1) likelihood that incumbent office-holders (including legislators) will, perhaps by virtue of their very incumbency, be subject to special temptations or motivations to violate the interest; (2) likelihood that large portions of the electorate will, on occasions of stress, be short-sighted or tunnel-visioned in estimating the importance of the interest to themselves; (3) unlikelihood that full enjoyment of the interest free of state interference will infringe on the legitimate interests of others; and (4) likelihood that courts can provide worthwhile protection for the interest without violating the framers' conception of a proper judicial role.

High scores on scales (3) and (4) will rarely, if ever, be sufficient in themselves to justify constitutional protection for an interest; rather their occurrence in conjunction with high scores on one or both of the other scales will confirm the case for protection which those other traits tend to make.[184] Traits (1) and (2) can be grouped together

181. *See* Michelman 995-96.

182. *See* Heymann, *supra* note 121, at 840-41.

183. Here and in the next few paragraphs, the word "framers" should be read to include judges engaged in constitutional interpretation, to just that degree to which the reader wishes to regard the courts as properly or actually engaged in "creative" interpretation.

184. It is easy to see how the first amendment interests in expressive, political, and religious liberties might fit the account suggested in the text. The same goes for safeguards concerning criminal prosecutions and related governmental activities found in the fourth, fifth, sixth, and eighth amendments and likewise for the safeguards against governmental seizures of property found in the third and fifth. (The partially related proscription of the contract clause seems to owe a lot to specific historical context.) The safeguards against state chauvinism found in the privileges and immunities clauses, the commerce clause, and the interstate travel right (whatever its textual base is supposed to be) also fit the suggested account. Heymann & Barzelay, *The Forest and the Trees*, Roe v. Wade *and Its Critics*, 53 B.U.L. REV. 765 (1963), is

as indicators of an interest's political "weakness." When an interest is politically weak, there exists an unusually high risk that normally reliable forces—legislative conscience, prudence, and responsiveness to constituent pressure—will fail to check laws which in a longer or broader view will be found inexpedient or unjust. As to such interests, but only as to them, framers might be willing to establish judicially enforceable restraints on legislative action ("substantive constitutional rights"), even though these limitations carry their own distinct risks of inflexibility and prudential obtuseness which will likely result on some occasions in preventing the legislature from passing laws which are, in truth, both expedient and just. Of course, as to any interest that is politically "strong"—any interest about which the framers would feel confident that a democratically controlled legislature would not wish or dare to pass laws that violate such interest without urgent or politically persuasive reasons—framers would be more likely to prefer the risk of an occasional legislative excess to the risk of overbroad judicial repression.

Insofar as the foregoing is found to be a persuasive account of constitutional limitations (it need not be found *the only* persuasive explanation—simply a good, competitive account), the automatic attribution to constitutional interests of exceptional power to override exclusionary court access fees seems hard to defend. For in terms of my suggested account, such an attribution must depend on reasoning that, when made explicit, appears two-pronged. If an interest *is not* so widely and strongly cherished that the political process can be relied upon to check excessive legislative enroachment upon that interest, so that protection in the form of a substantive constitutional right is deemed necessary despite its heavy systemic costs, it is peculiarly important that litigation aimed at effectuating that interest not be frustrated by access fees. If, on the other hand, an interest *does* have such political strength that it can normally expect adequate legal

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largely an argument that interests grouped under the heading of family privacy (marriage, procreation, child-rearing) fit the account rather well. On the other hand, the reluctance to constitutioualize any interest in being maintained at a minimum level of welfare might reflect a low score on scale (4), undermining possible high scores on scales (1) and (2). *See* Michelman 997-98, 1001-03, 1005-10.

The interest in not suffering discrimination on account of race of course scores very high on the composite scale. In fact, whenever the legislature employs express classifications, there is the suggestion of a divide-and-conquer tactic (or effect), implying significant scores on scales (1) and (2) and relating equal protection to the suggested framework. Of course, the doctrine of strict review for "suspect classifications," or in defense of "discrete and insular minorities," harmonizes nicely with this account of equal protection.

protection at the legislative and common law levels without constitutional compulsion, frustration by access fees of litigation in its support is a problem of lesser moment.

How can such reasoning be defended? The most obvious objection to it is that an interest's enjoyment of political strength implies a stable, popular view of it as intrinsically important. One might want to argue that if legislative (or other governmental) action of a certain sort is forbidden because the interests thereby threatened are thought too politically weak to assure adequate counteraction to feared legislative temptation and a substantive constitutional right is therefore (despite its systemic costs) erected to protect that interest, then obviously judicial counteraction is desired and anything (such as an exclusionary access fee) that gets in the way must be disfavored. This looks, indeed, like a very strong argument for invalidating access fees when applied in such cases with exclusionary effect. And so it is. What it is not, however, is an argument for treating indigent plaintiffs in these cases with any *greater* solicitude than we would afford to indigent plaintiffs seeking vindication of a broad spectrum of interests protected by nonconstitutional law. With constitutional limitations, we resort to law (judicial review) because of an apprehension that legislative restraint, or the popular will or popular morality inspiring it, cannot adequately be trusted to prevent inexpedient or unjust governmental action. But civil liability rules can quite analogously be seen as a systemically costly resort to law because nonlegal restraint (whether moral or prudential self-restraint by individuals or nonlegal external restraint by the community) cannot adequately be trusted to prevent inexpedient or unjust private action.[185] Limitations are found in the Constitution insofar as legislative (or other governmental) "boundary crossings" are feared; they are found in private law insofar as private boundary crossings are feared. There simply is no basis for saying that intrinsically more important boundaries are guarded by constitutional limitations than by nonconstitutional law. All we can say with confidence is that the boundaries guarded by the Constitution are thought to be inadequately guarded by nonconstitutional law and nonlegal restraint.[186]

185. *Cf.* J. RAWLS, *supra* note 80, at 240-41. The systemic costs of using legal rules to constrain behavior encompass costs of inflexibility analogous to those previously mentioned (see text accompanying notes 181-83 *supra*), including the cost of "unnecessary" restrictions on liberty—restrictions entailed by the rules but which particularistic, situational judgments would have opposed. *Cf.* Kennedy, *Legal Formality*, 2 J. LEGAL STUDIES 351, 359 (1973). Another cost is that of enforcement (*e.g.*, litigation costs including the time-loss and annoyance sustained by the participants).

186. *Compare* Tribe, *supra* note 167, at 46 n.213.

Is it possible that I have misconstrued the Court's attribution of significance to an interest's having been accorded special status in the Constitution? Constitutional status, it might be said, is not treated by the Court as a touchstone of an interest's importance in any intrinsic sense, but rather as determining a question of allocation of protective responsibility between the legislative and judicial branches of government.[187] It is the legislature's job, to be carried on free of judicial interference,[188] to decide what kind, scope, and degree of legal protection are appropriate for each of the residue of unmentioned interests—and this includes, of course, decision about when, if ever, it is best not to grant any protection at all. But when it comes to the specially mentioned interests, the judiciary has been given a much more substantial role in such decisions. Accordingly, when the Supreme Court holds that a plaintiff may not be prevented by exclusionary access fees from pursuing such legal protections as are generally available for his constitutionally "mentioned" interests such as freedom of association, while at the same time indicating that such exclusion is permissible with regard to the unmentioned interest in personal security, the Court is not to be understood as saying that the mentioned interest is intrinsically more important than the unmentioned one. Instead, the Court indicates only that the Framers were prepared to accept the risk that the legislatures would permit exclusion in the case of unmentioned interests, but rejected such a risk as regards the mentioned ones—perhaps making this differentiation for the very sorts of reasons I have suggested above.[189] That is, the Framers might have believed that in the case of politically strong interests, the legislatures would not allow for such exclusion without having strong and obvious (politically effective) reasons for doing so, whereas no such assurance existed in regard to politically weak interests.

There are two grounds for rejecting this interpretation of the Court's reliance on the constitutional factor in *Boddie, Kras,* and *Ortwein*—one of them conclusive, the other merely persuasive.

The conclusive ground is that the suggested reading does not square with the Court's clear message that due process prevents the exclusion of any defendant by an access fee. Since what a defendant normally has at stake is liberty or property *simpliciter*, and not one of

187. And also, in the case of United States Supreme Court review, constitutional status may determine a like question of allocation between the national and state governments. My discussion at this point owes much to another commentator. *See* Tribe, *supra* note 167.

188. Except, perhaps, where the legislature acts "irrationally," or discriminates "invidiously."

189. See text accompanying notes 181-86 *supra.*

the "preferred freedoms,"[190] there seems no escape from the conclusion that the Court is reading the due process clause sometimes to prohibit legislatures from denying a hearing (or allowing exclusion by fees) when legally protected, but constitutionally unmentioned, interests are in jeopardy.

The merely persuasive ground is that an exclusionary access fee will rarely, if ever, arise out of a legislature's having behaved in the way that most clearly calls for strict judicial review under the weak-interest/strong-interest theory of constitutional allocation of protective roles. The access fees are normally fixed all at once for a broad spectrum of civil actions. (This was true of the fees in the *Boddie* case.) Though these turn out to include some actions which would be brought in order to prevent or requite violations of constitutional interests, no one thinks that the legislature focused on that prospect in enacting or authorizing the access fees. The legislature has not given short shrift to politically weak interests; rather, paying weak interests no focused attention at all, it has given somewhat short shrift to the whole battery of supposedly *strong* interests. Thus the clearest reason for giving weak interests special status in the Constitution is not implicated where exclusion results from blanket civil-action access fees. The only ground the Court could have for selectively granting relief from such *de facto* exclusionary effects, using constitutional status as the basis of selection, would be its supposition that constitutional interests are peculiarly important.

3. Interests Ranked by Importance

If I am correct in suggesting that constitutional enshrinement is not an apt criterion of an interest's importance for litigation-access purposes, no insuperable problem is thereby posed for a Supreme Court staking out constitutional protection for court access rights. It is not as if the Court *must* have a principle at hand for differentiating among the interests clamoring for protection in the form of a judicial hearing (with constitutional "mention" furnishing the only imaginable principle); for there is no apparent reason why the Court could not extend such protection to every interest recognized by state law through such law's definition of valid legal claims and defenses.

But I do not mean it is self-evident that no satisfactory differentiating principle can be found (although constitutional mention is not a satisfactory one). Offhand it does not seem unreasonable to suggest that not all legally recognized claims are integral parts of the in-

190. See note 159 *supra.*

terest in "living," even though some obviously are. Thus, using as a benchmark the pristine cases of assault and trespass most clearly analogous to the impact on a defendant of an unmerited adverse judgment, the Court might be able to distinguish among legal claims according to how immediate and direct an invasion of the plaintiff's liberty (or impairment of the plaintiff's life) is involved. The Court might feel that even though it could not satisfyingly differentiate the plaintiff-victim's position in assault and trespass cases from that of an erroneously coerced defendant, yet in numerous other contexts it could say persuasively that the victim's remedial "right" was really just a prosecutorial role in a deterrence scheme, a function which the state could freely dispense with (or condition on payment of fees) if it so chose; or else the Court could assert that this "right" was a mere administrative convenience made available by the state without thereby either meaning to suggest recognition of any right or creating any reasonable understanding that a right was intended. Indeed, someone might gleefully offer *Kras* and *Ortwein* as excellent specimens of the latter category of cases.

While I cannot flatly gainsay the feasibility or utility of such a particularistic approach, I would suggest that the sorting of legal claims into those which do and do not have a right at their core is a subtler and more slippery task than may at first appear. Moreover, the number of claims which can be convincingly weeded out of the "rights" category is too small to make the task worth undertaking.

The preferred class of complaints cannot be limited to those alleging common-law intentional torts, simple negligence,[191] and breaches of contractual and fiduciary duties.[192] The line of exclusion can be pushed back by gradual steps. Certainly we should have to include claims based on statutes overtly meant to substitute a statutory scheme of protection for a traditional and basic common-law form.[193] And this simple extension reveals a principle which in turn entails a great deal more extension: it reminds us that legislation is often (at least evidently) concerned with the setting of boundaries—that our bound-

191. It seems clear that negligence must be included, for it consists of unjustified incursions upon another's liberty. By "simple negligence" I mean to restrict what is included (but not for long, see text accompanying note 196 *infra*) to cases in which the claim of unjustified injury rests in no way on a legal artifice such as a prima facie inference from a prohibitory statute.

192. Although some would argue that there is no right to have your promises kept, few would argue that there is no right to be compensated when they are broken. *Compare* POSNER 55-56, 98.

193. The classic example is workmen's compensation. *See, e.g.*, New York Cent. R.R. v. White, 243 U.S. 188 (1917).

aries are not definitively staked out by the "natural rights" elements of the common law, but are a resultant of complex interplay between those elements and positive law. Everyone who reflects on the problem understands why this is so. At bottom, the reason is that every boundary is a reciprocal proposition, protecting persons in one of their possible functions (or roles, or postures) while restricting them in another. Our liberties are our shackles. While the concepts of freedom and personal integrity are clear enough at their cores, they grow hazy at the edges of interaction; and a more-or-less continuous effort at definition is required in order that there may be any effective or tolerable boundaries at all. In part, this view simply indicates a need for traffic rules—your boundaries, not mine, have been crossed if the two of us have a head-on collision while I am driving on the left-hand side of the double white line. But it is also true that as societies evolve in various ways—as their resources, technologies, activities, aspirations, and moral sensitivities continue to change over time—realignments of boundaries will concomitantly be required.[194] It is for these reasons, presumably, that even the most committed natural rights theorists have conceded a proper role to legislation—or have even allowed that persons have a right to compel others to submit to a regime of civil society in which legislation is possible.[195]

We can easily see, then, that the preferred circle of claims must admit those of negligence based on violation of a "protective" statute and also those based directly on such a statute without negligence as a mediating premise.[196] At this point we can see a vista opening which has a limit but no handy stopping point. Somewhere between the action complaining of personal harm inflicted by emission of air pollutants in violation of statutory but not of common-law nuisance standards, and the action complaining of failure to file an environmental impact statement, "rights" may drop out; but it is extremely difficult to say just where—and wherever the line is drawn (if, indeed, it is possible to draw a line rather than merely resorting to an ad hoc method of including and excluding), it is going to seem arbitrary.

Moreover, it is not only claims having an obvious kinship with common-law claims in which rights may be detected. It may be that some basic social arrangements, such as private ownership and economic markets, are maintained, in part with the help of law, because these systems are thought to be the best way of assuring maximum

194. Fine-tuning the system by boundary-drawing is part of the courts' mission as well. See note 122 *supra.*

195. *E.g.*, I. KANT, *supra* note 88, at 64-67, 71-72, 75-77, 81.

196. See text accompanying notes 132-38 *supra.*

fulfillment of everyone's rightful interests—but only on the understanding that they are to be complemented by certain subsidiary arrangements, also involving legal claims, designed to avoid violations of the rightful interests of some that would otherwise result from the main arrangements. It requires no very heroic reach of imagination to see the claims excluded from court by the *Kras* and *Ortwein* decisions as arising under subsidiary arrangements designed to protect rights which would otherwise be unduly jeopardized by the market system. An assurance that economic failure need never preclude a fresh start is easily conceived as a condition of acceptance of a competitive, individualistic economy; and even in the natural-rights tradition there are indications that persons lacking other means have a right to receive the necessities of life from those with means to spare.[197]

The length and breadth of the legal order, then, may well be seen as rights-infested. Of course this notion is not the only way in which the legal order *can* be understood; but it is a way no less rooted in tradition, and no less intellectually respectable, than the economic approach.[198]

Insofar as one shares in the perception of the widespread infestation of statute law by notions of rights, an interesting consequence ensues about which I shall have more to say in Part II. There emerges a significant connection between voting and litigating regarded as participatory mediums. Each is an activity concerned with rights and boundaries. Litigation consummates the staking-out of boundaries undertaken at the legislative stage. There is something sharply jarring about a set of rules which firmly inveighs against exclusion of persons from the vote, while rather freely allowing their exclusion from the litigation arena.

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197. *See* 1 W. BLACKSTONE, COMMENTARIES *131; J. LOCKE, *supra* note 90, at 17.

198. There is still another, intellectually respectable perspective which regards the entire legislative output (including, it would seem, any forbearance on the part of the legislature to alter the common law) as quite lacking in any organizing purpose or direction. Analysts with this viewpoint see legislation as, instead, a collection of outcomes of political power plays, unrelated to one another except insofar as, taken altogether, they amount to a politically acceptable compromise among contending interests. *See* Kennedy, *supra* note 185, at 367-70. In this perspective it can well be said that the laws "have no spirit." *Id.* at 383. But I think we can ignore the spiritless-laws position because no one (so far as I am aware) is yet able to tell us how, from such a standpoint, it would be possible to develop an intellectually manageable conception of what interests are protected by the due process clause. Indeed, there is reason to believe that a court cannot base any of its reasoning on the spiritless-laws view, because that view makes it impossible for the court to act in the modes that make its actions those of a court rather than of a legislature or some other kind of agent. *See id.* at 396-98.